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Objection Deadline: September 11, 2013 at 4:00 p.m. (Prevailing Eastern Time)

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----	)	
In re:	)	Case No. 12-12020 (MG)
	)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,	)	Chapter 11
	)	
Debtors.	)	Jointly Administered
-----	)	

**DEBTORS' OBJECTION TO PROOFS OF CLAIM  
FILED BY REX AND DANIELA GILBERT AND KATHERINE PARKER-LOWE**



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**TO THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY JUDGE:**

Residential Capital, LLC and its affiliated debtors in the above-captioned chapter 11 cases (the “Chapter 11 Cases”), as debtors and debtors in possession (collectively, the “Debtors”), hereby file this objection (the “Objection”) seeking to expunge and disallow (i) proof of claim No. 1984 (the “Fees Claim”)<sup>1</sup> filed against Debtor GMAC Mortgage, LLC (“GMACM”) by Katherine Parker-Lowe (“Parker-Lowe”) as well as (ii) proof of claim No. 1991 (the “Litigation Claim,” together with the Fees Claim, the “Gilbert Claims”) filed by Rex and Daniela Gilbert against GMACM, pursuant to section 502(b) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 3007(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) on the grounds that the Gilbert Claims are without merit and do not include colorable claims against GMACM.<sup>2</sup> Accordingly, the Debtors seek entry of an order substantially in the form annexed hereto as Exhibit 1 (the “Proposed Order”) granting the requested relief. In support of the Objection, the Debtors submit the Declaration of Lauren Graham Delehey (annexed hereto as Exhibit 2, the “Delehey Declaration”) and respectfully represent as follows:

**JURISDICTION, VENUE AND STATUTORY PREDICATE**

1. This Court has jurisdiction over this Objection under 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

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<sup>1</sup> The Fees Claim is asserted against “GMAC Mortgage LLC / Residential Accredit Loans.” (See claim No. 1984). However, the inclusion of debtor Residential Accredit Loans appears to be erroneous, as neither Parker-Lowe nor the Gilberts have ever engaged in litigation with this entity. The Debtors assume confusion stems from the fact that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner of the Gilberts’ loan and is a party to the Gilberts’ Federal Suit. Therefore, only GMACM responds to claim No. 1984.

<sup>2</sup> The Debtors reserve all their rights to amend this Objection should any further bases come to light.



2. The statutory predicate for the relief requested herein is section 502(b) of the Bankruptcy Code and Bankruptcy Rule 3007(a).

**PRELIMINARY STATEMENT**

3. Mr. and Mrs. Gilbert filed a general unsecured claim for nearly \$6 million predicated on multiple state and federal causes of action pending in the federal courts of North Carolina for which no final judgment has been entered against GMACM; and their counsel, Katherine Parker-Lowe, filed a general unsecured claim for more than \$83,000 for attorneys' fees related to causes of action that are a part of the pending federal litigation, which have not yet been resolved.

4. The North Carolina litigation in the federal district court seeks monetary damages against GMACM for violation of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667(f) ("TILA"), and Regulation Z, 12 C.F.R. § 1026; the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 71.1 ("UDTPA"); North Carolina usury and collections laws, N.C. Gen. Stat. §§ 24 and 75-50; and breach of contract. It further seeks to enjoin a foreclosure sale of the Gilberts' real property, which is a moot issue at this time as the foreclosure order was reversed on appeal and no foreclosure is currently pending.

5. For the reasons discussed in greater detail below, the Gilberts' causes of action are without merit and their claim as well as their counsel's claim should be disallowed and expunged. The TILA Claim is not a valid claim against GMACM because, in its capacity as a loan servicer, GMACM is not liable for monetary damages to the claimants. In addition, the Gilberts are unlikely to succeed on the UDPTA claim because they fail to plead or proffer sufficient facts that demonstrate any deceptive or misleading statements by GMACM that caused actual injury to them. The North Carolina usury and collection law claims are also not likely to



succeed against GMACM because the Gilberts fail to plead the requisite statutory elements and thus fail to state a valid claim against GMACM. Moreover, without having achieved a judgment on the TILA or UDPTA claim, Ms. Parker-Lowe cannot recover attorneys' fees from GMACM. Therefore, both Claim Nos. 1984 and 1991 should be expunged by the Court from the GMACM Claims Register.

### **BACKGROUND**

#### **A. The Chapter 11 Cases**

6. On May 14, 2012, each of the Debtors filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code. The Debtors are managing and operating their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. These Chapter 11 Cases are being jointly administered pursuant to Bankruptcy Rule 1015(b).

7. On May 16, 2012, the United States Trustee for the Southern District of New York appointed a nine member official committee of unsecured creditors [Docket No. 102].

8. On July 17, 2012, the Court entered an order [Docket No. 798] appointing Kurtzman Carson Consultants LLC ("KCC") as the notice and claims agent in these Chapter 11 Cases. Among other things, KCC is authorized to (a) receive, maintain, and record and otherwise administer the proofs of claim filed in these Chapter 11 cases and (b) maintain an official claims registers for the Debtors.

9. On August 29, 2012, this Court entered an order approving the Debtors' motion to establish procedures for filing proofs of claim in the Chapter 11 Cases [Docket No. 1309] (the "Bar Date Order").<sup>3</sup>

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<sup>3</sup> The Bar Date Order established, among other things, (i) November 9, 2012 at 5:00 p.m. (Prevailing Eastern Time) as the deadline to file proofs of claim by virtually all creditors against the Debtors (the "General Bar Date") and prescribing the form and manner for filing proofs of claim; and (ii) November 30, 2012 at 5:00 p.m. (Prevailing (Cont.'d)



10. On October 30, 2012, Claimants filed the Gilbert Claims against GMACM, asserting (i) a general unsecured claim in the amount of **\$5,948,900** and (ii) a general unsecured claim in the amount of **\$83,181.11**. The Gilbert Claims are attached hereto as Exhibits 3 & 4.

**B. Loan History & Prepetition Litigation<sup>4</sup>**

11. On May 5, 2009, the Gilberts refinanced their home loan secured by their real property in Ocracoke, North Carolina. Specifically, they entered into a \$525,000.00 Deed of Trust with First National Bank of Arizona. Both spouses signed the Deed of Trust, the Adjustable Rate Rider, and the Interest Only Addendum to the Adjustable Rate Rider. Only Rex Gilbert signed the associated Adjustable Rate Note. The loan documents are annexed to the Delehey Decl. as Exhibit A (“the Loan Documents”). See Delehey Decl. at ¶ 3.

12. The Gilberts defaulted on their loan and foreclosure proceedings were initiated against them (“Foreclosure Suit”). The foreclosure was brought by David A. Simpson, P.C., Substitute Trustee, and the Substitution of Trustee identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 (“Deutsche”) as the holder of the Note and the lien created by the Deed of Trust. GMACM was not a party to the foreclosure suit. In June 2009, the Clerk of the Hyde County (NC) Superior Court entered an order authorizing the foreclosure on the Gilberts’ house. After an unsuccessful appeal of the clerk’s order to the Hyde County Superior Court, the Gilberts further appealed the order to the N.C. Court of Appeals. See Delehey Decl. at ¶ 5.

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Eastern Time) as the deadline for governmental units to file proofs of claim (the “Governmental Bar Date”). (Bar Date Order ¶¶ 2, 3). On November 7, 2012, the Court entered an order extending the General Bar Date to November 16, 2012 at 5:00 p.m. (Prevailing Eastern Time) [Docket No. 2093]. The Governmental Bar Date was **not** extended. To date, approximately 6,860 proofs of claim have been filed in these Chapter 11 Cases as reflected on the Debtors’ claims registers.

<sup>4</sup> The Court previously addressed the details of the Gilberts’ prepetition litigation with the Debtors. See Memorandum Opinion Denying the Gilbert Motion to Dismiss or to Vacate the Automatic Stay [Docket No. 1054].



13. During the pendency of their appeal, the Gilberts brought suit in North Carolina state court against Deutsche, David Simpson as Substitute Trustee, Residential Funding, LLC, and GMACM, the servicer of their loan. The defendants removed the suit to the U.S. District Court for the Eastern District of North Carolina on October 13, 2009 (the “Federal Suit”). See Delehey Decl. at ¶ 6.

14. The Federal Suit sought an injunction against the foreclosure sale and the Gilberts also asserted claims for violation of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667(f) (“TILA”), and Regulation Z, 12 C.F.R. § 1026; the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 71.1 (“UDTPA”); North Carolina usury and collections laws, N.C. Gen. Stat. §§ 24 and 75-50; and breach of contract. See Delehey Decl. at ¶ 7 & Exh. B thereto.

15. In October 2009, the defendants in the Federal Suit filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12, which was granted by the District Court on July 7, 2010. See Gilbert v. Deutsche Bank Trust Co. Ams., No. 09-CV-181-D, 2010 WL 2696763 (E.D.N.C. July 7, 2010). The Gilberts appealed the dismissal to the U.S. Court of Appeals for the Fourth Circuit (the “Fourth Circuit”). See Delehey Decl. at ¶ 8.

16. In May 2011, while the Fourth Circuit appeal was pending, the N.C. Court of Appeals reversed the sale order in the Foreclosure Suit, and the foreclosure suit has not recommenced. See Delehey Decl. at ¶ 9 & Exh. C thereto.

17. In May 2012, the Fourth Circuit reversed the District Court’s dismissal of the Gilberts’ lawsuit and reinstated the majority of their claims. Prior to issuance of the Fourth Circuit’s mandate, Debtors filed their Chapter 11 petition. As a result, the Fourth Circuit stayed the mandate as to GMACM and Residential Funding, LLC while issuing it as to the non-debtor



parties. At present, the Gilberts' lawsuit in the Fourth Circuit remains stayed as to GMACM and Residential Funding, LLC. See Delehey Decl. at ¶ 10 & Exh. D thereto.

**C. Proof of Claim No. 1984**

18. The Fees Claim, filed by Katherine Parker-Lowe, counsel for Mr. and Mrs. Gilbert, seeks the payment of attorneys' fees by GMACM, on a general unsecured basis, purportedly incurred by Mr. and Mrs. Gilbert in connection with their litigations against GMACM and other defendants.

**D. Proof of Claim No. 1991**

19. The Litigation Claim seeks nearly \$6 million of damages, on a general unsecured basis, purportedly owing to the claimants under both state and federal causes of action.

**RELIEF REQUESTED**

20. The Debtors file this Objection pursuant to section 502(b) of the Bankruptcy Code to expunge and disallow each of the Gilbert Claims.

**OBJECTION**

21. A filed proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). A properly completed proof of claim is *prima facie* evidence of the validity and amount of a claim. See FED. R. BANKR. P. 3001(f). A party in interest may object to a proof of claim, and once an objection is made, the court must determine whether the objection is well founded. See 4 COLLIER ON BANKRUPTCY ¶ 502.02[2] (16th ed. rev. 2012).

22. Although Bankruptcy Rule 3001(f) establishes the initial evidentiary effect of a filed claim, the burden of proof "[r]ests on different parties at different times." In re Smith, No. 12-10142, 2013 WL 665991, at \*6 (Bankr. D. Vt. Feb. 22, 2013) (citation omitted). The party objecting to the proof of claim "bears the initial burden of providing evidence to show that the proof of claim should not be allowed." In re MF Global Holdings, Ltd., Nos. 11-15059



(MG), 11-02790 (MG) (SIPA), 2012 WL 5499847, at \* 3 (Bankr. S.D.N.Y. Nov. 13, 2012). If the objecting party satisfies its initial burden and “the presumption of *prima facie* validity is overcome—*e.g.*, the objecting party establishes that the proof of claim lacks a sound legal basis—the burden shifts to the claimant to support its proof of claim unless the claimant would not bear that burden outside of bankruptcy.” *Id.* (citing In re Oneida Ltd., 400 B.R. 384, 389 (Bankr. S.D.N.Y. 2009) (“A proof of claim is *prima facie* evidence of the validity and amount of a claim, and the objector bears the initial burden of persuasion. The burden then shifts to the claimant if the objector produces evidence equal in force to the *prima facie* case . . . which, if believed, would refute at least one of the allegations that is essential to the claim’s legal sufficiency.”)). Once the burden is shifted back to the claimant, “it must prove its claim by a preponderance of the evidence.” *Id.* (citations omitted).

23. Section 502(b)(1) of the Bankruptcy Code provides, in relevant part, that a claim may not be allowed to the extent that “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law.” 11 U.S.C. § 502(b)(1). Whether a claim is allowable is “generally determined by applicable nonbankruptcy law.” In re W.R. Grace & Co., 346 B.R. 672, 674 (Bankr. D. Del. 2006). “What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law.” In re Hess, 404 B.R. 747, 749 (Bankr. S.D.N.Y. 2009) (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946)).

24. Here, the Debtors object to the Gilbert Claims on the basis that, after reviewing the Debtors’ books and records and the supporting documentation attached to the Gilbert Claims,



the Gilbert Claims are not supported by the Debtors' books and records. Therefore, the Gilbert Claims should be expunged and disallowed.

**CLAIM NO. 1991 – THE “LITIGATION CLAIM”**

**I. THE CLAIMANTS OVERSTATE AND FAIL TO SUBSTANTIATE THE  
PURPORTED DAMAGES AGAINST GMACM**

25. The Gilberts submitted a \$5,948,900.00 unsecured claim, attaching a copy of the North Carolina Court of Appeals order reversing the foreclosure order, the Fourth Circuit's opinion in the Federal Suit, and a copy of their Complaint in the Federal Suit, but fail to provide any supporting damages calculation corresponding to the face amount of the Litigation Claim.

26. The Debtors have determined that the Litigation Claim should be expunged and disallowed because it lacks sufficient documentation as to its validity and amount and has no basis in the Debtors' books and records.

27. Although a properly filed proof of claim constitutes *prima facie* evidence of the validity of the claim, Fed. R. Bankr. P. 3001(f), “failure to attach the documentation required by Rule 3001 will result in the loss of the *prima facie* validity of the claim”, In re Minbatiwalla, 424 B.R. 104, 112 (Bankr. S.D.N.Y. 2010), citing In re Lundberg, No. 02–34542(LMW), 2008 WL 4829846, at \*2 (Bankr. D. Conn. 2008); In re Hight, 393 B.R. 484, 493 (Bankr. S.D. Tex. 2008).

28. Failure to attach sufficient documentation to a proof of claim can result in disallowance of the claim under appropriate circumstances because absent adequate documentation, the proof of claim is not sufficient for the objector to concede the validity of the claim. Minbatiwalla, 424 B.R. at 119, citing In re Porter, 374 B.R. 471, 480 (Bankr. D. Conn. 2007) (“under some circumstances lack of [documentation required by Rule 3001(c)] followed by a creditor's failure to appear or otherwise respond to an objection ... made on the grounds of insufficient annexed documentation may result in a disallowance of the claim on procedural (i.e.,



default) grounds”); see also In re DePugh, 409 B.R. 125, 137-8 (Bankr. S.D. Tex. 2009) (holding that insufficient documentation is a valid basis for disallowing a claim as “unenforceable against the debtor...under any agreement or applicable law” under 11 U.S.C. § 502(b)(1) because of a lack of compliance with Bankruptcy Rule 3001).

**A. The Litigation Claim Fails To Account For The Lack Of Merit In The Claims Asserted In The Gilberts’ Lawsuit**

29. The Litigation Claim is based on contingent liabilities arising from claims asserted by the Gilberts against GMACM in the Federal Suit. None of those claims has been reduced to judgment, and the motion practice addressing the sufficiency of the pleadings and evidence supporting the claims are only in their initial stages. As detailed below, the Litigation Claim is without merit.

**1. The TILA Claim**

30. In Count I of their Complaint, the Gilberts allege that GMACM and others violated TILA by: (i) failing to “deliver all ‘material’ disclosures required by [TILA] and Regulation Z” (Complaint, ¶ 69); and (ii) failing to take the steps required by 15 U.S.C. § 1635(b)<sup>5</sup> to effectuate the rescission of the Gilberts’ secured loan after receiving timely notice of rescission (Id., ¶¶ 75-76).

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<sup>5</sup> Title 15 U.S.C. § 1635(b) provides as follows:

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor’s obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.



31. The trial court dismissed Count I based on the statute of limitations. That dismissal was reversed in part by the Fourth Circuit, which ruled that the claim regarding an alleged failure to deliver disclosures—an omission by the originating lender—was time barred but that the “claim regarding Appellees’ refusal to honor [Plaintiffs’] right to rescind was timely filed.” Gilbert v. Residential Funding LLC, 678 F.3d 271, 278 (4th Cir. 2012). Accordingly, the Gilberts’ only surviving TILA claim is based on GMACM’s alleged failure to comply with 15 U.S.C. § 1635(b).

32. As a consequence of the February 2013 sale of the servicing rights of the Gilberts’ loan to Ocwen Loan Servicing, LLC (“Ocwen”), GMACM no longer has any relationship with the Gilberts’ loan. Therefore, even if the Federal Court should determine that rescission is warranted, such relief must come from Ocwen and/or Deutsche. See Delehey Decl. at ¶ 11.

33. Apart from the rescission itself, the Gilberts also seek damages against GMACM under TILA. However, GMACM was only the servicer of the Gilberts’ loan, see Delehey Decl. at ¶ [ ], and “**loan servicers are not liable for money damages under TILA.**” Keiran v. Home Capital, Inc., Nos. 11-3878, 12-1053, 2013 WL 3481366, at \*6 n.5 (8th Cir. July 12, 2013); 15 U.S.C. § 1641(c)<sup>6</sup> & (f); Gale v. First Franklin Loan Servs., 701 F.3d 1240, 1245 (9th Cir. 2012); Harvick v. Am. Home Mortg. Servicing, Inc., No. 2:12-cv-03077-MCE-CKD, 2013 WL 3283523, at \*4 (E.D. Cal., Jun. 27, 2013); Marks v. Ocwen Loan Servicing, No. C 07-02133 SI, 2008 WL 344210, at \*2 (N.D. Cal., Feb. 6, 2008) (“[L]oan servicers are not liable under TILA as assignees unless the loan servicer owned the loan obligation at some point.”). At no point did GMACM own the Gilberts’ loan obligation. See Delehey Decl. at ¶ 2, 11. Therefore, any portion of the Gilberts’ claim related to TILA damages must be disallowed.

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<sup>6</sup> Section 1641(c) of TILA expressly says that “[a]ny consumer who has the right to rescind a transaction ... may rescind the transaction as against any **assignee of the obligation.**” (emphasis added).



## **2. The Usury Claim**

34. In Count II of the Federal Suit Complaint, the Gilberts allege that GMACM engaged in usurious conduct in violation of an unspecified section of Chapter 24 of the North Carolina General Statutes by “charging and collecting a greater rate of interest than allowed by law, . . . including without limitation the charge, collection and imposition of hidden finance charges contained in the erroneous payment schedule set forth in the Truth in lending [sic] disclosure statement.” (Complaint, ¶ 79).

35. The trial court dismissed the Gilberts’ usury claim because their Complaint failed to allege the payment of usurious interest within the two-year limitation period applicable to such claims. The Complaint did not specifically identify any payment, the charging or collection of that amounted to usurious conduct. The Fourth Circuit reversed, finding that the usury claim was adequately pled.<sup>7</sup>

36. The Gilberts’ allegations of usurious conduct by GMACM are so cursory that the trial court initially dismissed them as not amounting to a claim. While the Fourth Circuit disagreed with dismissal on the trial court’s stated grounds, it issued an explicit invitation for the trial court to examine additional potential grounds for dismissal. The Fourth Circuit directed the district court to “consider whether North Carolina General Statute Section . . . Section 24-9(a)(3) (“‘Exempt loan’ means a loan in which . . . [t]he loan amount is three hundred thousand (\$300,000) or more . . . .”), and Section 24-9(b) (“A claim or defense of usury is prohibited in an exempt loan transaction.”) are applicable.” Gilbert, 678 F.3d at 280.

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<sup>7</sup> The Fourth Circuit recited that that a usury claim is adequately pled if the following are alleged: (i) “a loan or forbearance of the collection of money”; (ii) “an understanding that the money owed will be paid”; (iii) “payment or an agreement to pay interest at a rate greater than allowed by law”; and (iv) “the lender’s corrupt intent to receive more in interest than the legal rate permits for use of the money loaned.” Gilbert, 678 F.3d 271 at 279.



37. Here, the Gilberts' loan is indisputably an "exempt loan" under N.C. Gen. Stat. § 24-9, as the principal balance exceeds \$300,000. Accordingly, under the plain language of N.C. Gen. Stat. § 24-9(b), no usury claim can be made in relation to the loan: "[a] claim or defense of usury is prohibited in an exempt loan transaction." Therefore, while the Gilberts may have sufficiently stated a usury claim under state law, they cannot maintain the claim in relation to their half-million dollar home loan, just as the Fourth Circuit suspected.

38. Even if the Gilberts' loan was not an exempt loan under North Carolina law, the usury claim would still fail on its face. In North Carolina, for purposes of a loan with a principal amount in excess of a \$25,000, the interest rate allowed by law is "[a]ny rate agreed upon by the parties." N.C. Gen. Stat. § 24-1.1(a)(2). Therefore, payment of interest at a rate "greater than allowed by law" means payment of interest in excess of the parties' agreed-upon rate. The Gilberts, however, did not pay any interest greater than the rate to which they agreed.

39. Rex Gilbert signed the Adjustable Rate Note and both spouses signed the Interest-Only Addendum associated with the couples' Deed of Trust. The Interest-Only Addendum provided that the Gilberts would make payments of \$3,226.57 each month "for the next 240 payments." See Exhibit D to the Delehey Decl. While servicing the Gilberts' loan, GMACM collected only 22 payments from the Gilberts, which included interest and additional amounts for their escrow account.<sup>8</sup> From each of those payments, \$3,226.56 was allocated to the payment of interest, as shown in the payment history annexed to the Delehey Decl. as Exhibit E. That amount is one penny less than the monthly payment amount disclosed in the Interest-Only Addendum. Consequently, the Gilberts did not pay any interest amounts higher than the amount agreed upon by the parties in the loan documents. See Delehey Decl. at ¶ 12.

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<sup>8</sup> Funds from the escrow account were used to pay the taxes and insurance associated with the Gilberts' property.



40. Because the Gilberts paid, and GMACM collected, only the amount of interest that the Gilberts agreed to in the Interest-Only Addendum, the Gilberts cannot prove payment of interest at a rate greater than allowed by law, i.e., payment of interest in excess of an agreed-upon rate. Therefore, their usury claim fails as a matter of law. See Swindell v. Fed. Nat'l Mortg. Assoc., 409 S.E.2d 892, 895 (N.C. Sup. Ct. 1991) (payment or an agreement to pay interest at a rate greater than allowed by law is a required element of usury claim).

### **3. The UDTPA Claim**

41. In Count III of their Complaint, the Gilberts allege violations of UDTPA by unspecified defendants based on the defendants' (i) failure to make material disclosures pursuant to TILA; (ii) disclosure, charging and collecting of allegedly usurious interest; (iii) failure to act on the rescission notice (as required by TILA); and (iv) making of false representations relative to note ownership. As a threshold matter, the Fourth Circuit ruled that the Gilberts' UDTPA claim was properly dismissed to the extent it is based on the alleged failure to make TILA disclosures, an omission by the loan originator, not any named party. Gilbert, 678 F.3d at 280.

42. "The elements of a claim for unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75–1.1 are: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business. Thus, recovery according to N.C. Gen. Stat. § 75–1.1 and 75–16 is limited to those situations when a plaintiff can show that it detrimentally relied upon a statement or misrepresentation and he or she suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." Dolan v. Dickson Props., Inc., No. COA12-681, 735 S.E. 2d 632 (Table), 2012 WL 6018701, at \*3 (N.C. Ct. App. Dec. 4, 2012) (quotations and citations omitted). "Under G.S. 75–1.1, an act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. An act or practice is deceptive



if it has the capacity or tendency to deceive.” SunTrust Bank v. Bryant/Sutphin Props., LLC, 732 S.E.2d 594, 598 (N.C. Ct. App. 2012) (quoting Ace Chem. Corp. v. DSI Transps., Inc., 446 S.E.2d 100, 106 (N.C. Ct. App. 1994)). “Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive trade practice.” SunTrust Bank, 732 S.E.2d at 598.

43. As noted above, the Gilberts cannot show GMACM engaged in usurious conduct. Usurious conduct can form the basis for a UDTPA claim only if it is shown that the collection of excessive interest was somehow deceptive or misleading. Id. Here, on those occasions when the Gilberts succeeded in making their loan payment, GMACM allocated \$3,226.56 to interest. Again, that amount is a penny less than the payment amount disclosed in the Interest-Only Addendum.

44. Were the monthly collection of interest in the amount of \$3,226.56 usurious conduct, which it was not, such collection could not be said to be deceptive or misleading. The Gilberts agreed to the monthly interest payment amount on May 5, 2006, before they ever made a single payment. They cannot now claim to be surprised that they were charged the monthly interest amount they acknowledged in writing they would pay each month. Accordingly, GMACM’s conduct in charging and collecting interest payments, even if taken as usurious, does not amount to a violation of UDTPA.

45. Similarly, the Gilberts cannot succeed on a UDTPA claim based on any statement by GMACM identifying Deutsche as the owner of their note. Deutsche owns the note and did at all times it might have been identified by GMACM as owner of the note. Contrary to what the Gilberts would have this Court believe, the N.C. Court of Appeals did not find that Deutsche did not own the note. That court ruled only that the trial court erred in finding Deutsche to be the



holder of the note based on the evidence presented during foreclosure proceedings. In re Simpson, 711 S.E.2d 165, 174-75 (N.C. Ct. App. 2011). Moreover, the Gilberts cannot show that they relied on any statement by GMACM relative to note ownership to their detriment. Because the Gilberts cannot show that any statement by GMACM to them regarding ownership of the note was false or the proximate result of any injury, no such statement can support a claim for violation for UDTPA. See Dolan, 2012 WL 6018701 at \*3.

46. GMACM's failure to effectuate rescission of the Gilberts' loan consistent with TILA also does not give rise to a UDTPA claim. GMACM reviewed the rescission notice and, after concluding that the Gilberts lacked grounds for rescission, informed the Gilberts of the rejection of their rescission request. GMACM was not deceptive or unfair in its handling of the request. It did not engage in any "immoral, unethical, oppressive, unscrupulous, or substantially injurious" conduct, which the UDTPA was intended to deter and punish. Moreover, as discussed above, the Gilberts do not proffer any evidence that they suffered an actual injury as a result of their inability to secure rescission of their loan. Proof of an injury proximately resulting from the conduct alleged to violate UDTPA is an essential element of a UDTPA claim. Ellis v. Smith-Broadhurst, Inc., 268 S.E.2d 271, 273-74 (N.C. Ct. App. 1980).

#### **4. The Collection Practices Act Claim**

47. In Count IV of their Complaint, the Gilberts allege violation by unspecified defendants of N.C. Gen. Stat. §§ 75-50–56 (the "Collection Practices Act" or "CPA"), detailing prohibited acts by debt collectors. The Gilberts claim "defendants" violated the CPA by: (i) communicating with a debtor represented by counsel; (ii) falsely representing the character and extent of a debt after its purported rescission; (iii) falsely representing that Deutsche owned the note; and (iv) attempting to foreclose without authority.



48. GMACM made no attempt to foreclose and could not have falsely represented that Deutsche owned the note because Deutsche did, in fact, own the note. Accordingly, the only CPA violations of which GMACM might be guilty relate to communications with the Gilberts instead of their attorney and representations by GMACM relative to the “character and extent” of the debt.

49. However, in their Complaint, the Gilberts do not specifically identify any communication or representation by GMACM that they consider to have violated the CPA. They generally allege that GMACM “[f]alsely represent[ed] the character, extent, or amount of a debt against a consumer pursuant to N.C. Gen. Stat. 74-54(4)” by seeking collection of amounts owed on the mortgage loan after receiving the Gilberts’ rescission notice. A violation of N.C. Gen. Stat. § 74-54(4) section, however, requires that a debt collector be shown to have “[f]alsely represent[ed] the character, extent, or amount of a debt against a consumer or of its status *in [a] legal proceeding . . .*” (emphasis added). “Because plaintiff’s [CPA] allegation . . . says nothing about a legal proceeding, plaintiff has failed to state a claim under section 74-54(4).” Key v. Dirty S. Custom Sound & Wheels, 2009 U.S. Dist. LEXIS 46907 (E.D.N.C. June 3, 2009). The Gilberts have not stated and cannot sustain a claim for violation of N.C. Gen. Stat. § 74-54(4) against GMACM because it made no representation, let alone a false representation, regarding the Gilberts’ debt in a legal proceeding in which it was attempting to collect a debt. *See* ¶48 *supra*; See N.C. Gen. Stat. § 74-54 (prohibiting certain representations in the course of collecting and attempting to collect debt).

50. The Gilberts further allege that GMACM violated the CPA by “communicating with plaintiffs after the defendants had been notified by the plaintiffs’ attorney that she represents said plaintiffs.” Although no statutory citation is given, the Debtors presume this



allegation is intended as a claim pursuant to N.C. Gen. Stat. § 74-55, which provides that “[n]o debt collector shall collect or attempt to collect any debt by use of any unconscionable means” including “Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer’s attorney that he represents said consumer.”

51. However, no communication violating N.C. Gen. Stat. § 74-55(3) is specifically identified in the Complaint or documentation supporting the Litigation Claim. Therefore, the Debtor cannot give any credence to such vague and unsubstantiated allegations.

## **5. The Remaining Claims**

52. In Count V of their Complaint, the Gilberts allege an unspecified breach of an unspecified contract by unspecified defendants. As documented by the loan documents entered into by the Gilberts in 2006, which were all with First National Bank of Arizona and its successors, GMACM had no contractual relationship with the Gilberts and therefore cannot be liable for any alleged breach of contract.

53. Through the sixth and final claim in their Complaint, the Gilberts seek equitable relief in the form of an order striking the foreclosure sale order. However, this non-monetary claim was rendered moot by the N.C. Court of Appeals’ reversal of the sale order and has no bearing on the Litigation Claim.

## **CLAIM NO. 1984 – THE “FEES CLAIM”**

### **II. THE CLAIMANT IMPERMISSIBLY SEEKS FEES FOR CLAIMS THAT HAVE NOT YET BEEN ADJUDICATED AND FOR UNRELATED MATTERS**

54. Pursuant to section 101 of the Bankruptcy Code, a creditor holds a claim against a bankruptcy estate only to the extent that it has a “right to payment” for the asserted liability. See 11 U.S.C. § 101(5). Likewise, section 502(b)(1) of the Bankruptcy Code provides, in relevant



part, that the Court shall allow a claim except to the extent that “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b)(1).

55. Parker-Lowe’s Fees Claim states a claim in the amount of \$83,181.11 and is premised on the Gilberts’ not-yet-adjudicated TILA and UDTPA claims. GMACM does not, in any way, concede that the Gilberts’ attorneys’ fees are a valid claim. Although TILA and the state UDTPA claims allow for the award of attorneys’ fees in the event of a successful claim, no court has adjudicated the Gilberts’ claims in their favor. Rather, the Fourth Circuit upheld the dismissal of the disclosure-related portion of the TILA claim and merely found that the rescission-based claim was *timely filed*. The Fourth Circuit further ruled that the Gilberts’ UDTPA claim was properly dismissed to the extent it is based on the alleged failure to make TILA disclosures and made no finding of liability as to that claim.

56. The TILA claim, and the associated Fees Claim, it is without merit because GMACM was only the servicer of the Gilberts’ loan and it was not the assignee of the loan itself. As detailed above, “loan servicers are not liable for money damages under TILA” and, therefore, cannot be liable for any associated attorneys’ fees. See Keiran, 2013 WL 3481366 at \*6 n.5.

57. The Gilberts’ claim for UDTPA, if GMACM were found liable for misconduct, would also allow for recovery of attorneys’ fees.<sup>9</sup> However, as explained above, such claim is without merit, as the Gilberts cannot establish that GMACM engaged in any “immoral, unethical, oppressive, unscrupulous, or substantially injurious” conduct, which the UDTPA was intended to deter and punish.

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<sup>9</sup> N.C.G.S.A. § 75-16.1 provides that attorneys’ fees can be awarded if the presiding judge finds that the defendant willfully engaged in the unfair or deceptive practice, that there was an unwarranted refusal to settle, and that the amount of the attorney’s fees was reasonable.



58. Further, the Fees Claim is supported by a copy of a “Charge Code & Services Statement” (the “Statement”) cataloguing the total fees and costs billed by Katherine Parker-Lowe, Esq. to Rex Gilbert between January 1, 2008 and May 13, 2012. The Statement reflects total charges of \$83,181.11, total payments of \$23,534.49 and a balance due of \$49,646.62.

59. The Fees Claim is otherwise impermissibly vague and overstated because the Statement fails to allocate time between the two (2) cases handled by Parker-Lowe on behalf of the Gilberts. Parker-Lowe represents the Gilberts in the Foreclosure Suit brought against them by Deutsche and in the Federal Suit filed by the Gilberts. GMACM is a party to only the Federal Suit, so litigation expenses related to the Foreclosure Suit cannot be claimed as recoverable from GMACM.

60. A conservative parsing of the Statement based on the dates of hearings and filings in the Foreclosure Suit shows approximately \$15,000 of the amount claimed in the Fees Claim to be attributable to work done by Parker-Lowe on the Foreclosure Suit. See Delehey Decl. at ¶ 13. A spreadsheet illustrating the allocation of fees to the foreclosure case is annexed to the Delehey Decl. as Exh. F.

61. For each of the forgoing reasons, the Fees Claim should be disallowed in its entirety.

### **NOTICE**

62. The Debtors have provided notice of this Motion in accordance with the Case Management Procedures Order, approved by this Court on May 23, 2012 [Docket No. 141] and the Procedures Order.



**CONCLUSION**

WHEREFORE, the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem proper.

Dated: August 20, 2013

/s/ Norman S. Rosenbaum

Gary S. Lee

Norman S. Rosenbaum

Jordan A. Wishnew

MORRISON & FOERSTER LLP

1290 Avenue of the Americas

New York, New York 10104

Telephone: (212) 468-8000

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*Counsel for the Debtors and  
Debtors in Possession*

-and-

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Charlotte, NC 28202

Telephone: 704-338-6005

Facsimile: 704-338-6089

*Special Litigation and Compliance Counsel for  
the Debtors and Debtors in Possession*



**EXHIBIT 1**



**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----	)	
In re:	)	Case No. 12-12020 (MG)
	)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,	)	Chapter 11
	)	
Debtors.	)	Jointly Administered
-----	)	

**ORDER GRANTING DEBTORS' OBJECTION TO PROOFS OF CLAIM FILED  
BY REX AND DANIELA GILBERT AND KATHERINE PARKER-LOWE**

Upon the objection (the “**Objection**”)<sup>1</sup> of Residential Capital, LLC, and certain of its affiliates, as debtors and debtors in possession (collectively, the “**Debtors**”) to the Proofs of Claim and request for entry of an order (the “**Order**”) pursuant to section 502(b) of the Bankruptcy Code and Bankruptcy Rule 3007 seeking to disallow and expunge the Proofs of Claim, all as more fully set forth in the Objection, and the Declaration of Lauren Delehey annexed to the Objection as Exhibit 2; and the Court having jurisdiction to consider the Objection and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Objection and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due and sufficient notice of the Objection having been provided; and the Court having determined that the legal and factual bases set forth in the Objection establish just cause for the relief granted herein; and it appearing that the relief requested in the Objection is in the best interests of the Debtors’ estates, their creditors and other parties in interest; and responses to the Objection, if

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Objection.



any, having been resolved, withdrawn or otherwise overruled by this Order; and after due deliberation and sufficient cause appearing therefore, it is hereby

**ORDERED, ADJUDGED, AND DECREED THAT:**

1. The relief requested in the Objection is GRANTED as set forth herein.
2. The Proofs of Claim are hereby disallowed and expunged in their entirety and shall no longer be maintained on the Debtors' claim register, and Kurtzman Carson Consultants LLC, the Claims and Noticing Agent, is directed to disallow and expunge the Proofs of Claim.
3. Entry of this Order is without prejudice to the Debtors' right to object to any other claims in the Debtors' Chapter 11 Cases.
4. The Debtors are authorized and empowered to take all actions as may be necessary and appropriate to implement the terms of this Order.
5. Notice of the Objection as provided therein shall be deemed good and sufficient notice of such objection, and the requirements of the Procedures Order, Bankruptcy Rule 3007(a) and the Local Bankruptcy Rules of this Court are satisfied by such notice.
6. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
7. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the interpretation or implementation of this Order.



Dated: \_\_\_\_\_, 2013  
New York, New York

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THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY JUDGE



**EXHIBIT 2**



**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----	)	
In re:	)	Case No. 12-12020 (MG)
	)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,	)	Chapter 11
	)	
Debtors.	)	Jointly Administered
-----	)	

**DECLARATION OF LAUREN GRAHAM DELEHEY, IN-HOUSE LITIGATION  
COUNSEL AT RESIDENTIAL CAPITAL, LLC, IN SUPPORT OF DEBTORS'  
OBJECTION TO PROOFS OF CLAIM FILED BY REX AND DANIELA GILBERT  
AND KATHERINE PARKER-LOWE AGAINST GMAC MORTGAGE, LLC  
PURSUANT TO BANKRUPTCY CODE  
SECTION 502(b) AND BANKRUPTCY RULE 3007**

I, Lauren Graham Delehey, hereby declare as follows:

1. I serve as In-House Litigation Counsel in the Legal Department at Residential Capital, LLC ("**ResCap**"), a limited liability company organized under the laws of the state of Delaware and the parent of the other debtors and debtors in possession in the above-captioned Chapter 11 cases (collectively, the "**Debtors**").<sup>1</sup> I have held this position since I joined ResCap on August 1, 2011. In my role as In-House Litigation Counsel at ResCap, I am responsible for the management of residential mortgage-related litigation, including class actions, mass actions and multi-district litigation. I am authorized to submit this declaration (the "**Declaration**") in support of the *Debtors' Objection to Proofs Of Claim Filed By Rex And Daniela Gilbert And Katherine Parker-Lowe Against GMAC Mortgage, LLC Pursuant to Section 502(b) of the Bankruptcy Code and Bankruptcy Rule 3007* (the "**Objection**").

<sup>1</sup> The names of the Debtors in these cases and their respective tax identification numbers are identified on Exhibit 1 to the *Affidavit of James Whitlinger, Chief Financial Officer of Residential Capital, LLC, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 6], dated May 14, 2012.



2. In my capacity as In-House Litigation Counsel, I am generally familiar with the Debtors' litigation matters, including the Gilbert Claims (defined below) and putative class actions to which the Debtors are parties. Except as otherwise indicated, all statements in this Declaration are based upon my personal knowledge; information supplied or verified by personnel in departments within the Debtors' various business units; my review of the Debtors' litigation case files, books and records as well as other relevant documents; my discussions with other members of the Legal Department; information supplied by the Debtors' consultants; or my opinion based upon experience, expertise, and knowledge of the Debtors' litigation matters, financial condition and history. In making my statements based on my review of the Debtors' litigation case files, books and records, relevant documents, and other information prepared or collected by the Debtors' employees or consultants, I have relied upon these employees and consultants accurately recording, preparing, collecting, or verifying any such documentation and other information. If I were called to testify as a witness in this matter, I would testify competently to the facts set forth herein.

## **I. BACKGROUND**

### **A. Loan History and Prepetition Litigation**

3. On May 5, 2009, Rex and Daniela Gilbert (the "**Gilberts**") refinanced their home loan secured by their real property in Ocracoke, North Carolina. Specifically, they entered into a \$525,000.00 Deed of Trust with First National Bank of Arizona. Both spouses signed the Deed of Trust, the Adjustable Rate Rider, and the Interest Only Addendum to the Adjustable Rate Rider. Only Rex Gilbert signed the associated Adjustable Rate Note. The assorted loan documents are annexed hereto as Exhibit A (the "**Loan Documents**").

4. GMACM was only the servicer of the Gilberts' loan.



5. The Gilberts defaulted on their loan and foreclosure proceedings were initiated against them (“**Foreclosure Suit**”). The foreclosure was brought by David A. Simpson, Substitute Trustee, and the Substitution of Trustee identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 (“**Deutsche**”) as the holder of the Note and the lien created by the Deed of Trust. In June 2009, the Clerk of the Hyde County (NC) Superior Court entered an order authorizing Deutsche to foreclose on the Gilberts’ house. After an unsuccessful appeal of the clerk’s order to the Hyde County Superior Court, the Gilberts further appealed the order to the N.C. Court of Appeals.

6. During the pendency of their appeal, the Gilberts brought suit in North Carolina state court against Deutsche, David Simpson as Substitute Trustee, Residential Funding, LLC, and GMACM, the servicer of their loan. The defendants removed the suit to the U.S. District Court for the Eastern District of North Carolina on October 13, 2009 (the “**Federal Suit**”). A copy of the Federal Suit is attached as Exhibit B hereto.

7. The Federal Suit sought an injunction against the foreclosure sale and the Gilberts also asserted claims for violation of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667(f) (“**TILA**”), and Regulation Z, 12 C.F.R. § 1026; the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 71.1 (“**UDTPA**”); North Carolina usury and collections laws, N.C. Gen. Stat. §§ 24 and 75-50; and breach of contract.

8. In October 2009, the defendants in the Federal Suit filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12, which was granted by the District Court on July 7, 2010. See Gilbert v. Deutsche Bank Trust Co. Ams., No. 09-CV-181-D, 2010 WL 2696763 (E.D.N.C. July 7, 2010). The Gilberts appealed the dismissal to the U.S. Court of Appeals for the Fourth Circuit (the “**Fourth Circuit**”).



9. In May 2011, while the Fourth Circuit appeal was pending, the N.C. Court of Appeals reversed the sale order in the Foreclosure Suit, and the foreclosure suit hasn't recommenced. A copy of the North Carolina court's reversal is attached as Exhibit C hereto.

10. In May 2012, the Fourth Circuit reversed the District Court's dismissal of the Gilberts' lawsuit and reinstated the majority of their claims. Prior to issuance of the Fourth Circuit's mandate, Debtors filed their Chapter 11 petition. As a result, the Fourth Circuit stayed the mandate as to GMACM and Residential Funding, LLC while issuing it as to the non-debtor parties. See Exhibit D attached hereto. At present, the Gilberts' lawsuit in the Fourth Circuit remains stayed as to GMACM and Residential Funding, LLC.

11. As a consequence of the February 2013 sale of the servicing rights of the Gilberts' loan to Ocwen Loan Servicing, LLC ("**Ocwen**"), GMACM no longer has any relationship with the Gilberts' loan. Before the sale of the servicing rights, GMACM never owned the note underlying the Gilberts' loan obligation.

12. Rex Gilbert signed the Adjustable Rate Note and both spouses signed the Interest-Only Addendum associated with the couples' Deed of Trust. The Interest-Only Addendum provided that the Gilberts would make payments of \$3,226.57 each month "for the next 240 payments." (See Exhibit A hereto). While servicing the Gilberts' loan, GMACM collected only 22 payments from the Gilberts, which included interest and additional amounts for their escrow account.<sup>2</sup> From each of those payments, \$3,226.56 was allocated to the payment of interest. (See Exhibit E hereto.) That amount is one penny less than the monthly payment amount disclosed in the Interest-Only Addendum. Consequently, the Gilberts did not pay any interest amounts higher than the amount agreed upon by the parties in the loan documents.

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<sup>2</sup> Funds from the escrow account were used to pay the taxes and insurance associated with the Gilberts' property.



13. A conservative parsing of the Statement based on the dates of hearings and filings in the Foreclosure Suit shows approximately \$15,000 of the amount claimed in the Fees Claim to be attributable to work done by Parker-Lowe on the Foreclosure Suit. A spreadsheet illustrating the allocation of fees to the foreclosure case is annexed hereto as Exhibit F.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 20, 2013

/s/ Lauren Graham Delehey  
Lauren Graham Delehey  
In-House Litigation Counsel for Residential  
Capital, LLC



**Exhibit A**



FILED in Hyde County, NC  
on May 10 2006 at 02:38:57 PM  
by Cora Rooney Burd  
Register of Deeds  
BOOK 219 PAGE 53

## DEED OF TRUST

MAY 11 2006  
Return To: First National Bank of Arizona  
P.O. Box 66604, Phoenix, AZ 85082  
Prepared By: Ngoc Chu  
and Casey, Grimsley & Ragaller, PLLC

MIN 1001355530000008437

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated May 5, 2006  
together with all Riders to this document.

(B) "Borrower" is Rex T. Gilbert, JR and Daniela L. Gilbert, Husband and Wife

Borrower is the trustor under this Security Instrument.

(C) "Lender" is First National Bank of Arizona

Lender is a NATIONAL BANKING ASSOCIATION  
organized and existing under the laws of The United States of America  
0843

NORTH CAROLINA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS Form 3034 1/01

2210-6A(NC) (0203).01

Page 1 of 16

Initials: RTG

VMP MORTGAGE FORMS - (800) 521-7291

DC



BOOK 219 PAGE 54

Lender's address is 1760 Old Meadow Road, 3rd Floor, Mc Lean, VA 22102

(D) "Trustee" is **MATTHEW J. RAGALLER**

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(F) "Note" means the promissory note signed by Borrower and dated May 5, 2006

The Note states that Borrower owes Lender five hundred twenty-five thousand and 00/100

Dollars

(U.S. \$525,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than June 1, 2036

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- |   |   |  |
|---|---|--|
| <input checked="" type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider             |
| <input type="checkbox"/> Balloon Rider                    | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> 1-4 Family Rider              |
| <input type="checkbox"/> VA Rider                         | <input type="checkbox"/> Biweekly Payment Rider         | <input checked="" type="checkbox"/> Other(s) [specify] |
|   |   | Interest Only Rider                                    |

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard

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to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee and Trustee's successors and assigns, in trust, with power of sale, the following described property located in the

COUNTY

of

Hyde

[Type of Recording Jurisdiction]

[Name of Recording Jurisdiction]

SEE ATTACHED LEGAL DESCRIPTION

Parcel ID Number: 207592

134 West End Road

Ocracoke

("Property Address"):

which currently has the address of

[Street]

[City], North Carolina 27960

[Zip Code]

TO HAVE AND TO HOLD this property unto Trustee and Trustee's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

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THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. If Borrower has breached any covenant or agreement in this Security Instrument and Lender has accelerated the obligations of Borrower hereunder pursuant to Section 22 the Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. **Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and

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assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to

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prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any

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interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is

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reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

**10. Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve, if permitted under Applicable Law, in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve, if permitted under Applicable Law. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, if permitted under Applicable Law, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement

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provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material

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impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time.

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Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects

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Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

**21. Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, and if it is determined in a hearing held in accordance with Applicable Law that Trustee can proceed to sale, Trustee shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as Applicable Law may require. After the time required by Applicable Law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, Trustee's fees of 5.000 % of the gross sale price; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it. The interest rate set forth in the Note shall apply whether before or after any judgment on the indebtedness evidenced by the Note.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender or Trustee shall cancel this Security Instrument. If Trustee is requested to release this Security Instrument, all notes evidencing debt secured by this Security Instrument shall be surrendered to Trustee. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Attorneys' Fees. Attorneys' fees must be reasonable.

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BY SIGNING UNDER SEAL BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

\_\_\_\_\_  
Rex T. Gilbert, JR (Seal)  
-Borrower

\_\_\_\_\_  
\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

Daniela L. Gilbert (Seal)  
Daniela L. Gilbert -Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

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STATE OF NORTH CAROLINA,

I, LINDA RUSH

a Notary Public of the County of Dare

certify that Rex T. Gilbert, JR & Daniela L. Gilbert

Dare

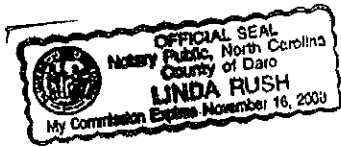
County ss:

, State of North Carolina, do hereby

personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 5th day of May, 2006

My Commission Expires:



Linda Rush  
Notary Public

STATE OF NORTH CAROLINA,

The foregoing certificate of  
a Notary Public of the County of

is certified to be correct.

This \_\_\_\_\_ day of \_\_\_\_\_

County ss:

, State of \_\_\_\_\_

Registrar of Deeds

By \_\_\_\_\_  
Deputy Assistant

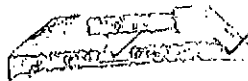
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## ADJUSTABLE RATE RIDER

(LIBOR Six-Month Index (As Published In *The Wall Street Journal*) - Rate Caps)

THIS ADJUSTABLE RATE RIDER is made this 5th day of May, 2006 and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to First National Bank of Arizona

("Lender") of the same date and covering the property described in the Security Instrument and located at: 134 West End Road, Ocracoke, NC 27960

[Property Address]

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE INTEREST RATE AND THE MONTHLY PAYMENT. THE NOTE LIMITS THE AMOUNT BORROWER'S INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.

**ADDITIONAL COVENANTS.** In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

### A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for an initial interest rate of 7.375 %. The Note provides for changes in the interest rate and the monthly payments, as follows:

### 4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

#### (A) Change Dates

The interest rate I will pay may change on the first day of June, 2013 and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

#### (B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

#### (C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters (2.750 %) to the Current Index. The Note Holder will then round the result of

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**MULTISTATE ADJUSTABLE RATE RIDER - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL) - Single Family - Fannie Mae Uniform Instrument**

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this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

**(D) Limits on Interest Rate Changes**

The interest rate I am required to pay at the first Change Date will not be greater than 13.375 % or less than 2.750 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one

percentage points ( 1.000 %) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 13.375 %.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes**

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

**B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER**

Uniform Covenant 18 of the Security Instrument is amended to read as follows:

**Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

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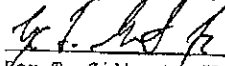
Form 3138 1/01

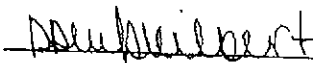


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If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

  
Rex T. Gilbert, JR. (Seal)  
-Borrower

  
(Seal)  
-Borrower

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-Borrower

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-Borrower

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INTEREST-ONLY ADDENDUM  
TO ADJUSTABLE RATE RIDER

LOAN NUMBER: 0843

PROPERTY ADDRESS:

134 West End Road, Ocmeco, NC 27960

THIS ADDENDUM is made this 5th day of May, 2006, and is incorporated into and intended to form a part of the Adjustable Rate Rider (the "Rider") dated the same date as this Addendum executed by the undersigned and payable to First National Bank of Arizona (the Lender).

THIS ADDENDUM supersedes Section 4 (C) of the Rider. None of the other provisions of the Note are changed by this Addendum.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

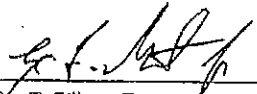
(C) Calculation of Changes


Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage point(s) (2.750%) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

During first ten (10) years after the loan closing ("interest-only period"), the Note Holder will determine the amount of the monthly payment that would be sufficient to pay accrued interest on the unpaid principal balance. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the interest only period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the interest-only period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower unpaid principal balance.

At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal balance that I am expected to owe in substantially equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the interest-only period, my payment amount will not be adjusted due to voluntary principal payments.

Dated: 5/5/06

  
\_\_\_\_\_  
Rex T. Gilbert, JR

  
\_\_\_\_\_  
Daniela L. Gilbert



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Exhibit "A"

All that certain lot or parcel of land lying and being in the Village of Ocracoke, in Ocracoke Township, Hyde County, North Carolina, and known and designated as and being Lot No. 85-A, in the subdivision known as Beachside Extension, as shown and delineated on a map or plat entitled "Recombination Plat of Lot 84-A & 85-A - Beachside Extension - Ocracoke, formerly lot 84 & 85 - Beachside Extension - Ocracoke" made by Seaboard Surveying & Planning, Inc., and recorded in Plat Cabinet C, Slide 89B, Hyde County Registry.



## ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In *The Wall Street Journal*) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

May 5, 2006  
[Date]

MCLEAN  
[City]

VA  
[State]

134 West End Road, Ocracoke, NC 27960  
[Property Address]

### 1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 525,000.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is **First National Bank of Arizona**

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

### 2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.375 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

### 3. PAYMENTS

#### (A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on July 1, 2006

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on June 1, 2036, I still owe amounts under this

Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. BOX 62768, PHOENIX, AZ 85085-2768

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments See Attached Interest-Only Addendum here to and made a part here of.

Each of my initial monthly payments will be in the amount of U.S. \$ 4,391.32. This amount may change.

#### (C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

5300000843

MULTISTATE ADJUSTABLE RATE NOTE - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN *THE WALL STREET JOURNAL*) -  
Single Family - Fannie Mae UNIFORM INSTRUMENT

UHP-838N (0210)

Form 3520 1/01

VMP MORTGAGE FORMS - (800)521-7291

Page 1 of 4

Initials: R. I.



**4. INTEREST RATE AND MONTHLY PAYMENT CHANGES**

**(A) Change Dates**

The interest rate I will pay may change on the first day of June, 2013, and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

**(B) The Index**

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

**(C) Calculation of Changes**

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage points (2.750 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

**(D) Limits on Interest Rate Changes**

The interest rate I am required to pay at the first Change Date will not be greater than 13.375 % or less than 2.750 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one percentage point(s) (1.000 %) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 13.375 %, OR LESS THAN 2.750 %.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes**

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

**5. BORROWER'S RIGHT TO PREPAY**

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

**6. LOAN CHARGES**

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

0843



**7. BORROWER'S FAILURE TO PAY AS REQUIRED**

**(A) Late Charges for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of **fifteen** calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be **4.000 %** of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

**(B) Default**

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

**(C) Notice of Default**

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

**(D) No Waiver By Note Holder**

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

**(E) Payment of Note Holder's Costs and Expenses**

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

**8. GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

**9. OBLIGATIONS OF PERSONS UNDER THIS NOTE**

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

**10. WAIVERS**

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

**11. UNIFORM SECURED NOTE**

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

0843

122410-838N 102101

Page 3 of 4

Form 3520 1/01  
Initials: RTG



**Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

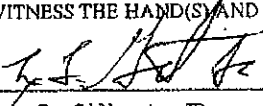
If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

**CAUTION-IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.**

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

  
\_\_\_\_\_  
Rex T. Gilbert, JR. (Seal) (Seal)  
-Borrower -Borrower

\_\_\_\_\_  
(Seal) (Seal)  
-Borrower -Borrower

\_\_\_\_\_  
(Seal) (Seal)  
-Borrower -Borrower

\_\_\_\_\_  
(Seal) (Seal)  
-Borrower -Borrower

*(Sign Original Only)*

0843

12310-B38N (02/10)

Page 4 of 4

Form 3520 1/01



**INTEREST-ONLY ADDENDUM  
TO ADJUSTABLE RATE PROMISSORY NOTE**

Loan Number:           0843          

Property Address: 134 West End Road, Ocracoke, NC 27960

**THIS ADDENDUM** is made this 5th day of May, 2006, and is incorporated into and intended to form a part of the Adjustable Rate Note (the "Note") dated the same date as this Addendum executed by the undersigned and payable to First National Bank of Arizona (the "Lender").

**THIS ADDENDUM** supersedes Sections 3(A), 3(B), 4(C) and 7(A) of the Note. None of the other provisions of the Note are changed by this addendum.

**3. PAYMENTS**

**(A) Time and Place of Payments**

I will pay interest by making payments every month for the first 120 payments (the "Interest-Only Period") in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 240 payments in an amount sufficient to fully amortize the outstanding principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments.

I will make my monthly payments on the first day of each month beginning on July 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at 1165 West Alameda Drive, Tempe, AZ 85282 or at a different place if required by the Note Holder.

**(B) Amount of My Initial Monthly Payments**

Each of my initial monthly payments will be in the amount of U.S. \$3,226.57. This payment amount is based on the original principal balance of the Note. This payment amount may change.

**4. INTEREST RATE AND MONTHLY PAYMENT CHANGES**

**(C) Calculation of Changes**

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage point(s) (2.750%) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment amount will not be reduced due to voluntary prepayments.

**7. BORROWER'S FAILURE TO PAY AS REQUIRED**

**(A) A Late Charge for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000% of my overdue payment of interest during the interest-only period, 4.000% of my overdue payment of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

Dated: 5/5/06

Rex T. Gilbert, JR  
Rex T. Gilbert, JR





1665 W. Alameda Drive  
Tempe, AZ 85282  
Office (480) 224-8321 Fax 480-224-8522

ALLONGE TO NOTE

LOAN NUMBER: [REDACTED] 0843  
BORROWER: Gilbert JR  
IN THE AMOUNT OF: \$525,000.00

PAY TO THE ORDER OF:

First National Bank of  
Nevada

WITHOUT RECOURSE BY:

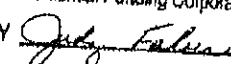
  
AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

Pay to The order Of  
**RESIDENTIAL FUNDING CORPORATION**

Without Recourse  
First National Bank of Nevada

By:  
Deutsche Bank National Trust  
Company, F/K/A Bankers Trust  
Company of California, N. A.  
as Custodian as Attorney in  
Fact

Christopher Corcoran  
Vice President

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation  
BY   
Judy Faber, Vice President



**Exhibit B**



THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION  
NO. \_\_\_\_-\_\_\_\_-CV-\_\_\_\_(\_\_\_\_)

REX T. GILBERT, JR. AND )  
DANIELA L. GILBERT, )  
 )  
PLAINTIFFS, )

v. )

NOTICE OF REMOVAL

28 U.S.C. §§1331, 1441, and 1446

DEUTSCHE BANK TRUST COMPANY )  
AMERICAS, AS TRUSTEE FOR )  
RESIDENTIAL ACCREDIT LOANS, )  
INC. DAVID A SIMPSON, P.C., )  
SUBSTITUTE TRUSTEE, )  
RESIDENTIAL FUNDING, LLC )  
AND GMAC MORTGAGE, LLC )  
DEFENDANTS. )

PLEASE TAKE NOTICE that Defendants, Deutsche Bank Trust Company Americas, As Trustee for Residential Accredit Loans, Inc., Residential Funding, LLC, and GMAC Mortgage, LLC (Herein collectively "Defendants"), pursuant to 28 U.S.C. §§1331, 1441, and 1446, file this Notice of Removal of this action from the Superior Court Division of the General Court of Justice, Hyde County, North Carolina, being the district embracing the place where the case is pending. Furthermore, David A. Simpson, P.C., being a nominal Defendant does hereby affirmatively and expressly consent to and join in this Notice of Removal of this



matter from the Superior Court Division of the General Court of Justice, Hyde County. Defendants state the grounds for removal as follows:

TIMELINESS OF REMOVAL

1. Plaintiffs, Rex T. Gilbert, Jr. and Daniela L. Gilbert, commenced this action, designated Civil Action No. 09 CVS 70, on or about September 14, 2009 by filing a Complaint in the General Court of Justice, Superior Court Division, Hyde County, North Carolina. Defendants' counsel is in receipt of a file-stamped copy of the Complaint, but at this time has no information regarding service of the Summons and Complaint by the Plaintiff. This removal was effected within 30 days of receipt of the Complaint by Defendants' counsel, 28 U.S.C. §1446(b), and the time within which Defendants are required by the laws of the North Carolina to answer or otherwise plead has not yet expired.

FEDERAL QUESTION JURISDICTION

2. This action is alleged to arise under the Federal Truth in Lending Act, 15 U.S.C. §1601 *et. seq.*, and the implementing regulations codified at 12 C.F.R. Part 226, of which the district courts have original jurisdiction pursuant to 28 U.S.C. §1331.

3. This Court has supplemental jurisdiction over the state law claims asserted in this action pursuant to 28 U.S.C. § 1367(a).



4. Accordingly, this case is removable under 28 U.S.C. §1441.

COMPLIANCE WITH 28 U.S.C. §1446

5. Defendants have attached to this Notice as **Exhibit 1** and filed herewith the Complaint, Civil Summons, Affidavit of Keith Parker-Lowe, Restraining Order, Notices of Hearing, and Affidavit of Scott Zeitz, which to date constitute all process, pleadings and orders received by them in this action, all in compliance with the provisions of 28 U.S.C. §1446(a).

6. Contemporaneously with the filing of this Notice of Removal, written notice has been served upon the Plaintiffs and a true and accurate copy of this Notice of Removal has been or will be filed with the Clerk of Superior Court for Hyde County, North Carolina, as required by 28 U.S.C. §1446(d).

7. The Superior Court for Hyde County, North Carolina is located within the jurisdiction of the United States District Court for the Eastern District of North Carolina, Eastern Division; therefore this Court is the proper one for removal of this action.

8. The Defendants have submitted the required filing fee of Three Hundred Fifty Dollars (\$350.00) to the Clerk of Court.

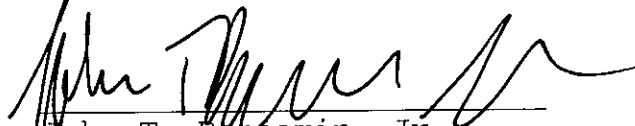
9. By filing this Notice, Defendants do not waive any defense that may be available to it.

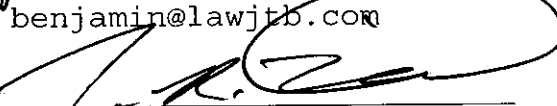


WHEREFORE, Defendants, Deutsche Bank Trust Company Americas, As Trustee for Residential Accredit Loans, Inc., Residential Funding, LLC, GMAC Mortgage, LLC, and David A. Simpson, P.C., Substitute Trustee, respectfully request that this action now pending in the State of North Carolina, Hyde County, Superior Court Division, as Civil Action No. 09 CVS 70, proceed before this Court as an action properly removed.

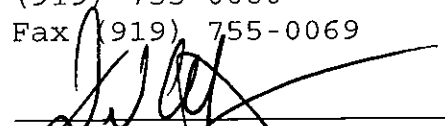
This the 13<sup>th</sup> day of October, 2009.

THE LAW OFFICE OF JOHN T. BENJAMIN, JR., P.A.

  
John T. Benjamin, Jr.  
N.C. State Bar No. : 18673  
benjamin@lawjtb.com

  
James R. White  
N.C. State Bar No.: 29508  
white@lawjtb.com

*Attorneys for Defendants, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc, Residential Funding, LLC and GMAC Mortgage, LLC.*  
712 West North Street  
Raleigh, N.C. 27603  
(919) 755-0060  
Fax (919) 755-0069

  
David A. Simpson, P.C.  
By: David A. Simpson, President  
dvdsimpson@msn.com  
7804 Fairview Road, No. 225  
Charlotte, N.C. 28226  
(704) 619-6551  
Fax (704) 442-8595



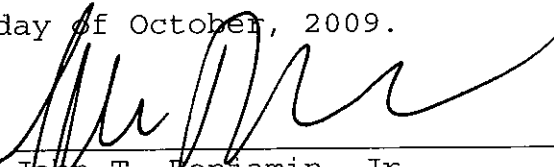
CERTIFICATE OF SERVICE

I, John T. Benjamin, Jr., of The Law Office of John T. Benjamin, Jr., P.A., attorney for Deutsche Bank Trust Company Americas, as Trustee for Residential Credit Loans, Inc., Residential Funding, LLC, and GMAC Mortgage, LLC do hereby certify that I served a copy of the foregoing document upon the other parties in this action by depositing the same in the United States Mail, postage prepaid, addressed as follows:

Katherine S. Parker-Lowe  
Attorney at Law  
35 Miss Elecia Lane, Ste. 101  
Post Office Box 730  
Ocracoke, North Carolina 27960

David A. Simpson, P.C.  
Substitute Trustee  
7804 Fairview Road, No. 225  
Charlotte, N.C. 28226

This the 17<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
John T. Benjamin, Jr.  
Attorney for Deutsche Bank Trust Company,  
Residential Funding, LLC and  
GMAC Mortgage, LLC



STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70  
CODE: COMP: OTHR

REX T. GILBERT, JR. and  
DANIELA L. GILBERT,  
Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS, As Trustee for,  
RESIDENTIAL ACCREDIT LOANS, INC,  
DAVID A. SIMPSON, P.C., Substitute Trustee,  
RESIDENTIAL FUNDING, LLC, and  
GMAC MORTGAGE, LLC,  
Defendants.

**FILED**  
**ONE** 10:15 Am  
SEP 14 2009  
**CLERK SUPERIOR COURT**  
**HYDE COUNTY**  
Deputy **CLERK**

**COMPLAINT**

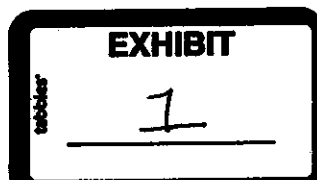
NOW COME the plaintiffs by and through their counsel of record and allege and say as follows:

**JURISDICTION**

This action is instituted pursuant to N.C. Gen. Stat. § 45-21.34 for the purpose of enjoining the foreclosure sale authorized by Order of the Honorable Marvin Blount in Hyde County File 09-SP-09 and raising legal and equitable defenses, including but not limited to, rescission pursuant to rights granted under the federal Truth in Lending Act, material disclosures violations of the federal Truth in Lending Act, unfair and deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, et. seq., and the charging and collecting of usurious interest in violation of N.C. Gen. Stat. § 24-2, et. seq.

**PARTIES**

1. The plaintiffs are citizens and residents of Hyde County North Carolina.





2. Defendant, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 (hereinafter Deutsche) is, upon information and belief, an entity that serves as Trustee for securitized pools of mortgage loans that are secured by North Carolina real property and regularly uses the North Carolina Courts for purposes of foreclosing mortgage loans that it holds as Trustee. Defendant Deutsche purports to be the owner and holder of the Adjustable Rate Note (hereinafter Promissory Note) and Deed of Trust that are the subject of this complaint and has, upon information and belief, instructed the Substitute Trustee of a Deed of Trust signed by plaintiffs, to file the foreclosure action known as 09 SP 09 in the Superior Court of Hyde County, North Carolina.

3. Defendant, David A. Simpson, P.C. (hereinafter Simpson) is a professional corporation organized under the laws of the State of North Carolina which, upon information and belief, contracts with financial services companies to provide Substitute Trustee services for prosecution of foreclosures in North Carolina and, upon information and belief, purports to have been appointed as a Substitute Trustee under the Deed of Trust that secures the mortgage loan that is the subject of this complaint.

4. Defendant Residential Funding, LLC (hereinafter Residential Funding) is, upon information and belief, a limited liability company which purports to be the master servicer for the Note and Deed of Trust which is the subject of this complaint.

5. Defendant, GMAC Mortgage, LLC (hereinafter GMAC) is, upon information and belief, a limited liability company which regularly services loans secured by real property located in North Carolina. GMAC purports to be the current subservicer of the Note and Deed of Trust which is the subject of this complaint.



FACTUAL ALLEGATIONS

6. All paragraphs of this complaint are incorporated herein as if fully set forth.

7. Plaintiffs, Rex T. Gilbert, Jr. and Daniela L. Gilbert, are husband and wife and reside upon a tract of land that is titled in their name as tenants by the entirety on Ocracoke Island, Hyde County, North Carolina.

8. During the late winter or early spring of 2006, plaintiff, Daniela Gilbert, telephoned First Flight Mortgage, LLC office located at 2503 North Croatan Highway in Kill Devil Hills, North Carolina.

9. During the months of March and April of 2006, plaintiff, Daniela L. Gilbert spoke on many occasions with Emily Berry-Belvin, who represented herself to be the loan officer for First Flight Mortgage, LLC who would handle the mortgage loan transaction for plaintiffs.

10. Upon information and belief, Emily Berry-Belvin, was, at all times pertinent to the transactions described in this complaint, the employee or agent of First Flight Mortgage, LLC, with full actual and apparent authority to act for First Flight Mortgage, LLC.

11. During the spring of 2006, plaintiffs were struggling to make the payments on an adjustable rate mortgage loan and wanted to refinance to cash out money until they were able to sell their home and borrow money to build another home on an adjacent parcel of land.



12. Plaintiff, Daniela L. Gilbert, talked with Emily Berry-Belvin and explained that plaintiffs wanted to refinance their mortgage loan with a loan that would allow them to cash out money until they sold their home and built a new lower cost home.

13. Plaintiff, Daniela L. Gilbert, provided Emily Berry-Belvin with copies of plaintiffs' bank statements to show their income.

14. The income documentation provided by plaintiffs does not show monthly income of \$10,950.00 each month.

15. At some point, Emily Berry-Belvin called plaintiffs to advise of the need for an appraisal. After some discussion, Emily Berry Belvin represented to plaintiffs that their home needed to appraise at \$700,000.00 in order for them to get the loan.

16. When plaintiff, Daniela L. Gilbert, offered to contact John W. Hunter, a licensed appraiser who has considerable experience appraising residential properties on Ocracoke, Emily Berry-Belvin advised plaintiff that they needed someone "more aggressive with the numbers."

17. On information and belief, Ms. Berry-Belvin contacted Marco P. Garcia with Appraisal Group Outer Banks, Inc. who conducted, prepared and signed a Uniform Residential Appraisal Report which valued the plaintiff's property at \$700,000.00.

18. Plaintiffs did not receive a copy of aforementioned appraisal under sometime after the loan transaction which is the subject matter of this complaint was completed. The copy received by plaintiffs is inserted into a plastic binder with a green spine which matches the color of the First Flight Mortgage logo and includes a cover sheet with First Flight Mortgage letterhead.



19. When the appraisal came in, Emily Berry-Belvin represented to plaintiffs that they would close before the end of April, 2006.

20. Emily Berry-Belvin told plaintiff, Daniela L. Gilbert, not to make further payments to the lender that currently held plaintiffs' mortgage loan because the refinance loan would be closing during the month of April.

21. In reasonable reliance upon the statements and assurances of Emily Berry-Belvin, that the refinance loan would close during the month of April, plaintiffs followed her instruction and withheld the May 2003 mortgage payment and plaintiffs proceeded to use the money that would otherwise have been used for the May mortgage payment for other necessary household expenses.

22. The mortgage loan finally closed late on the afternoon of May 5, 2006.

23. During the month of May, 2006 and shortly before the May 5, 2006, loan closing, plaintiff, Daniela L. Gilbert, received a telephone call from Emily Berry-Belvin who stated that because the plaintiffs were planning to sell their home, the refinance they would be getting would be an interest only loan. No other option was presented to plaintiffs.

24. Plaintiffs voiced objections to the interest-only loan; however, plaintiffs were reassured by Emily Berry-Belvin that this was the best option for them given their financial situation and she led plaintiffs to believe that they would be able to refinance the terms of the loan in a year or so.

25. On May 5, 2006, plaintiffs traveled to Nags Head to the office of a lawyer for the loan closing.



26. Upon arrival at the lawyer's office, plaintiffs were advised that they would have to wait because the paper work had not arrived.

27. After waiting several hours and having to make calls to Ocracoke to arrange for unplanned after school child care, the plaintiffs were finally ushered into a back office to sign the paper work beginning at approximately 5:50 p.m.

28. Plaintiffs did not meet the lawyer who was supposed to be handling the closing. Instead, plaintiffs met with an assistant who sat across the table from the plaintiffs with a stack of papers marked with stickies indicating where their signatures were needed.

29. The assistant did not review the documents with the plaintiffs nor did she explain the contents or purpose of any of the documents. The assistant hurried plaintiffs through the signing process by showing plaintiffs where to sign and instructing them to sign. Plaintiffs did look at several of the documents but did not have an opportunity to review the full extent of the contents of all of the documents.

30. Once the plaintiffs had signed each of the documents in the place indicated by the assistant, the meeting was over. Plaintiffs did not receive any of the documents or copies of any of the documents after they had completed the signing process.

31. Among other documents, plaintiffs executed a Promissory Note in the amount of \$525,000.00 and a Deed of Trust securing the Promissory Note for the benefit of the original lender, First National Bank of Arizona.

32. The copy of the Promissory Note presented at the foreclosure hearing in the matter 09 SP 09 in Hyde County Superior Court bore an additional page entitled



"Allonge to Note" (hereinafter Allonge) The Allonge purports to meet the requirements of N.C. Gen. Stat. § 25-1-201(21) by showing indorsements, authorized signatures, by the various and multiple entities purporting to assign and transfer the Promissory Note and Deed of Trust from the original lender, First National Bank of Arizona through to present purported holder and owner, defendant Deutsche. (Exhibit 1)

33. The Allonge shows an indorsement by First National Bank of Arizona to First National Bank of Nevada.

34. The Allonge shows an indorsement by Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact wherein it purports to have authority to indorse on behalf of First National Bank of Nevada to Residential Funding Corporation.

35. Plaintiffs have requested documentation to substantiate the authority of Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact to act on behalf of First National Bank of Nevada; no such information has been provided; therefore, on information and belief, there is no underlying documentation to substantiate the indorsement by Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact for First National Bank of Nevada to Residential Funding Corporation.

36. The Allonge shows an indorsement from Residential Funding Corporation to Deutsche Bank Trust Company Americas as Trustee.

37. With respect to Residential Accedit Loans, Inc., the Allonge bears no indorsement to Residential Accredit Loans, Inc. which is the entity which purports to be the owner and holder of the note.



38. The Allonge bears the indorsement "Deutsche Bank Trust Company of Americas Trustee". The indorsement does not state for whom Deutsche Bank is acting as Trustee.

39. The Promissory Note executed by plaintiff provides for interest to be charged at a yearly rate of 7.375% and for the first *84 monthly payments in the amount of \$4,391.32*. (Exhibit 2) This same Promissory Note indicates on its face that there was an interest-only addendum to the note.

40. The interest-only addendum states that it superseded certain sections of the Promissory Note; to wit: *the first 120 payments in the amount of \$3226.57 and the next 240 payments in an amount sufficient to fully amortize the outstanding principal balance of the note over the remaining term of the Note in equal monthly payments.* (Exhibit 3)

41. The federal Truth in Lending disclosure statement provided to plaintiffs at closing disclosed the following:

APR:	Finance charge	Amount Financed	Total of Payments
7.953%	\$943469.57	\$507,473.43	\$1,450,943.00

Payment Schedule:

84 payments @ \$3226.57  
36 payments @ \$3500.00  
239 payments @ \$4391.32  
1 payment @ \$4385.64

(Exhibit 4)



42. The payment schedule disclosed on the Truth in Lending Disclosure Statement does not match the payment schedule set forth in the Promissory Note or the interest only addendum to the Promissory Note.

43. To date, plaintiffs have failed to receive a Truth in Lending Disclosure Statement which accurately discloses the payment schedule for the transaction which is the subject of this Complaint.

44. The three day right to cancel the transaction is extended until plaintiffs receive the Truth in Lending disclosures or the expiration of three years whichever is later.

45. On April 5, 2009, plaintiffs by and through their counsel exercised their extended right to rescind the loan transaction by giving written notice. (Exhibit 5)

46. By letter dated April 24, 2009, Kathy Priore, Associate Counsel for GMACM, advised that it "would not rescind the Loan transaction at this time." (Exhibit 6)

47. The payment schedule set forth on the Truth in Lending Disclosure Statement charges plaintiffs more than \$100,000.00 in hidden finance charges.

48. Beginning in the summer of 2008, plaintiffs attempted to negotiate with defendant GMAC for a loan modification by submitting detailed financial documentation.

49. Plaintiffs were told that they needed to make two consecutive regular mortgage payments before they would be considered for a loan modification.

50. Plaintiffs spent untold hours on hold on the telephone attempting to contact representatives of defendant GMAC sometimes with success but many times without success. Plaintiffs never spoke to the same representative twice.



50. On or about August 27, 2008, plaintiffs received a letter from defendant GMAC returning their last mortgage payment and informing plaintiffs that they had failed to honor the trial period.

51. In a state of near panic, plaintiff telephoned defendant GMAC and after a long wait on hold plaintiff was told that the representative responsible for processing their request for loan modification had been fired for failing to process loan modifications.

52. Plaintiff was assured by a representative of defendant GMAC that he would place a hold on the foreclosure status and work with them to process the loan modification. Plaintiff was subsequently unable to reach this representative again.

53. On or after September 5, 2008, plaintiffs received an overnight envelope from defendant GMAC regarding a loan modification.

54. Plaintiff learned that they had been approved for a loan modification which modified the interest rate to 5.7500% on a new principal balance of \$541,036.08, on a term of 332 months with a maturity date of June 1, 2026.

55. The loan modification also required them to make a lump sum payment of \$8051.40 by October 1, 2008 and begin making the modified payments on November 1, 2008.

56. The loan modification reduced plaintiffs' monthly mortgage payment by 4429.99. Plaintiffs were unable to make the lump sum payment required to qualify for the loan modification.

57. Beginning in October, 2008, plaintiffs attempted by and through counsel to negotiate with defendant GMAC.



58. On October 14, 2008, plaintiffs faxed releases of information authorizing defendant GMAC to discuss their account with counsel.

59. Defendant GMAC advised plaintiffs that it would take up to five days for verification of the release of information to post to plaintiffs account and until such time defendant GMAC was not authorized to speak with counsel.

60. On October 20, 2008, plaintiffs through counsel again attempted without success to speak with representatives of defendant GMAC regarding plaintiffs' account.

61. On November 2, 1008, plaintiffs through counsel wrote to defendant GMAC regarding options for a real loan modification. Plaintiffs did not receive a response to this letter.

62. On November 14, 2008, plaintiffs through counsel spoke with defendant GMAC's representative Jay Graves regarding their account. Plaintiffs were advised that the modification had been denied because of the failure to make the lump sum payment.

63. On January 9, 2009, plaintiffs again through counsel wrote to defendant GMAC regarding a loan modification. Plaintiffs did not receive a response to this letter.

63. On February 10, 2009, plaintiffs again through counsel wrote to defendant GMAC regarding their account.

64. On February 20, 2009, defendant GMAC by letter advised plaintiffs' counsel that until she submitted written permission from the plaintiffs, defendant GMAC could not speak with counsel.

#### CLAIMS FOR RELIEF

#### STATEMENT OF NATURE OF CLAIMS ASSERTED



65. This action is filed, in part, to enjoin the mortgage foreclosure sale ordered in 09 SP 09, Hyde County, on equitable and legal grounds pursuant to N.C. Gen. Stat. §45-21.34. All claims asserted affirmatively by plaintiffs in this action are also asserted, in the alternative, in defense and recoupment against any claim of indebtedness arising from the mortgage loan obligations and transactions that are the subject of this complaint.

**FIRST CLAIM FOR RELIEF**  
**VIOLATIONS OF TRUTH IN LENDING**  
**AGAINST DEFENDANTS DEUTSCHE, RESIDENTIAL FUNDING AND GMAC**

66. All paragraphs of this complaint are incorporated herein as if fully restated.

67. This consumer credit transaction was subject to the Plaintiffs' right of rescission as described by 15 U.S.C. § 1635 and Regulation Z § 226.23 (12 C.F.R. § 226.23).

68. Defendants Deutsche, Residential Funding and GMAC as purported assignees of First National Bank of Arizona and servicers and subservicers of the purported holder of the Promissory Note are liable to plaintiffs for violations 15 U.S.C. § 1635(a) and Regulation Z § 226.23(b) for failure to timely deliver to the Plaintiffs two copies of the notice of the right to rescind which clearly and conspicuously disclosed the date the rescission period expired.

69. Defendants Deutsche, Residential Funding and GMAC as purported assignees of First National Bank of Arizona and servicers and subservicers of the purported holder of the Promissory Note are liable to plaintiffs for failing to deliver all "material" disclosures required by the Act and Regulation Z, including the following:

a. By failing to properly and accurately disclose the "amount financed," using that term in violation of Regulation Z § 226.18(b) and 15 U.S.C. §1638(a)(2)(A).

b. By failing to clearly and accurately disclose the "finance charge," using that term, in violation of Regulation Z §§ 226.4 and 226.18(d) and 15 U.S.C. §1638(a)(3).



c. By failing to clearly and accurately disclose the "annual percentage rate," using that term, in violation of Regulation Z § 226.18(e) and 15 U.S.C. § 1638(a)(4).

d. By failing to properly disclose the number, amounts, and timing of payments scheduled to repay the obligation, in violation of Regulation Z § 226.18(g) and 15 U.S.C. § 1638(a)(6).

e. By failing to clearly and accurately disclose the "total of payments," using that term, in violation of Regulation Z § 226.18(h) and 15 U.S.C. § 1638(a)(5).33.

70. These material disclosure violations are apparent from the face of the disclosure statement and other documents assigned pursuant to the requirements of 15 U.S.C. § 1641(a).

71. Plaintiffs have a continuing right to rescind the transaction until the third business day after receiving both the notice described in paragraph 50 and all "material" disclosures described in paragraph 69, pursuant to 15 U.S.C. § 1635(a) and Regulation Z § 226.23(a)(3), up to three years after consummation of the transaction.

72. On April 5, 2009, Plaintiffs by and through counsel rescinded the transaction by sending to a notice of rescission addressed to "Holder of Loan # , c/o Ms. Lauren S. Thurmond, Kellam & Pettit, P.A. , 2701 Coltsgate Road, Suite 300, Charlotte, North Carolina 28211.

73. Counsel for defendants forwarded the plaintiffs' letter of rescission to GMAC.

74. More than 20 calendar days have passed since the Defendants received copies of the Plaintiff's notice of rescission.

75. Defendants have failed to take any action necessary or appropriate to reflect the termination of the security interest created under this transaction as required by 15 U.S.C. § 1635(b) and Regulation Z § 226.23(d)(2).



76. Defendants have failed to return to plaintiffs any money or property given by the plaintiffs to anyone, including the defendants, as required by 15 U.S.C. §1635(b) and Regulation Z § 226.23(d)(2).

77. As a result of the aforesaid violations of the Act and Regulation Z, pursuant to 15 U.S.C. §§ 1635(a), 1640(a), and 1641(c), defendants are liable to plaintiffs for:

- a. Rescission of this transaction.
- b. Termination of any security interest in Plaintiff's property created under the transaction.
- c. Return of any money or property given by the Plaintiff to anyone, including the Defendant, in connection with this transaction.
- d. Statutory damages of \$2000 for the disclosure violations.
- e. Statutory damages of \$2000 for Defendants' failure to respond properly to Plaintiff's rescission notice.
- f. Forfeiture of return of loan proceeds.
- g. Actual damages in an amount to be determined at trial.
- h. A reasonable attorney fee.

SECOND CLAIM FOR RELIEF  
USURY

78. All paragraphs of this complaint are incorporated herein as if fully restated.

79. With willful and corrupt intent to charge and collect a greater rate of interest than allowed by law, defendants charged and collected interest in excess of the agreed rate or limits set forth in Chapter 24 of the North Carolina General Statutes, including without limitation, the charge, collection and imposition of hidden finance charges contained in the erroneous payment schedule set forth in the Truth in lending disclosure statement.

80. These acts and practices entitle plaintiffs to the remedies set out in N.C.G.S. § 24-2 *et seq.*, and defendant, Deutsche, as purported holder of the loan and by reason of its joint venture relationship with defendants, Residential Funding and



GMAC is jointly and severally liable with defendants, Residential Funding and GMAC, for all damages pursuant to this Claim.

**THIRD CLAIM FOR RELIEF**  
**UNFAIR TRADE PRACTICES PURSUANT TO N.C. GEN. STAT. 75-1.1**

81. All paragraphs of this complaint are incorporated herein as if fully restated.

82. Defendants have engaged in unfair methods of competition in or affecting commerce or unfair or deceptive acts or practices in or affecting commerce in at least but not limited to the following:

- a. disclosing, charging and collecting usurious rates of interest;
- b. failing to make material disclosures pursuant to the requirements of the federal Truth in Lending Act;
- c. failing to take affirmative steps to cancel the plaintiffs' Deed of Trust upon their notice of rescission;
- d. falsely representing to be the owner and holder of plaintiffs' note and deed of trust;

83. These acts and omissions proximately damaged plaintiffs, are in and affecting commerce, violate public policy, have the capacity to deceive an ordinary consumer, are unscrupulous, immoral, and oppressive, and constitute unfair and/or deceptive trade practices under N.C.G.S. § 75-1.1, thereby entitling plaintiffs to three times their actual damages plus a reasonable attorney's fee pursuant to N.C.G.S. §§ 75-16 and 75-16.1.

**FOURTH CLAIM FOR RELIEF**  
**VIOLATIONS OF NORTH CAROLINA'S PROHIBITED ACTS BY DEBT COLLECTORS**  
**PURSUANT TO N.C. GEN. STAT. § 75-50 ET. SEQ.**

84. All paragraphs of this complaint are incorporated herein as if fully restated.



85. Plaintiffs are consumers within the meaning of N.C. Gen. Stat. § 75-50 et seq.

86. Defendants are debt collectors within the meaning of N.C. Gen. Stat. § 75-50 et. seq.

87. Defendants have attempted to collect a debt within the meaning of N.C. Gen. Stat. § 75-50(2).

88. Defendants have engaged in acts of debt collection in violation of N.C. Gen. Stat. § 75-50 et. seq. in at least but not limited to the following:

a. communicating with plaintiffs after the defendants had been notified by the plaintiff's attorney that she represents said plaintiffs;

b. falsely representing the character, extent, or amount of debt against a consumer pursuant to N.C. Gen. Stat. § 75-54(4) to wit: all attempts to collect money from plaintiffs after plaintiffs forwarded their notice of rescission to the noteholder;

c. falsely representing to be owner and holder of the plaintiffs' Promissory Note;

d. attempting to foreclose on plaintiffs' property without legal authority.

89. Defendants are liable to plaintiffs for actual damages and a statutory penalty of \$2000.00 for each violation proved at trial and reasonable attorney's fees.

#### FIFTH CLAIM FOR RELIEF BREACH OF CONTRACT

90. All paragraphs of this complaint are incorporated herein as if fully restated.

91. On or about May 5, 2006, plaintiff executed a Promissory Note in favor of First National Bank of Arizona.



92. The federal Truth in Lending disclosure statement provided to plaintiffs at closing disclosed the following payment schedule:

84 payments @ \$3226.57  
36 payments @ \$3500.00  
239 payments @ \$4391.32  
1 payment @ \$4385.64

93. The payment schedule set forth in paragraph 74 is a breach of the contract between plaintiff and the original lender.

94. Plaintiffs are entitled to actual damages and reasonable attorney's fees.

#### SIXTH CLAIM FOR RELIEF

95. All paragraphs of this complaint are incorporated herein as if fully restated.

96. On or about May 5, 2006, plaintiff executed a Promissory Note in favor of First National Bank of Arizona.

97. Defendant, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc. purports to be the owner and holder of the Promissory Note executed by plaintiff to First National Bank of Arizona by and through various indorsements.

98. Under N.C. Gen. Stat. § 25-3-301, the holder of a negotiable instrument may enforce payment in his own name.

99. N. C. Gen. Stat. § 25-1-201(21) defines a holder of an instrument as one who is in possession of an instrument "drawn, issued, or indorsed to him or to his order or to bearer or in blank.

100. Where a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly indorsed and delivered.



101. Mere possession of a note payable to order does not suffice to prove ownership or holder status. . Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

102. The Allonge under and by which Defendant Deutsche claims to hold is defective in at least the following:

a. on information and belief, the indorsement by Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact on behalf of First National Bank of Nevada is not duly authorized;

b. the indorsement to Defendant Deutsche is in its representative capacity as trustee not to Defendant Deutsche in its own name. No principal's name appears in the indorsement.

103. Defendant Deutsche is without authority and capacity to enforce the Promissory Note executed by plaintiff to First National Bank of Arizona.

104. The Court should strike the Order allowing foreclosure by sale entered by Judge Blount as void.

105. Defendants are liable to plaintiffs for an amount to be proven at trial.

**PLAINTIFFS' FIRST MOTION FOR INJUNCTIVE RELIEF AGAINST DEFENDANTS  
TO PRESERVE THE STATUS QUO AND TO PREVENT DELAYING TACTICS BY  
PROHIBITING THE ASSIGNMENT OF THE MORTGAGE OR SERVICING  
RIGHTS DURING THE COURSE OF THE LITIGATION**

106. All paragraphs of this complaint are incorporated herein as if fully restated.

107. Plaintiffs, pursuant to Rule 65(b) of the North Carolina Rules of Civil Procedure, move this Court for an Order granting a Preliminary Injunction, enjoining these defendants from conveying or assigning any interest in the mortgage loan that is the subject of this litigation until and unless otherwise allowed by Court Order.



108. As grounds for said Motion, plaintiffs reallege and incorporate herein by reference the facts of this verified complaint and state additionally that they will suffer immediate and irreparable harm if said defendants undertake to delay these proceedings by forcing addition or joinder of parties who may subsequently obtain an interest in plaintiffs' loan. The prospect of prolonged delay by virtue of sale or assignment of interests in this loan is not without precedent by similarly situated lender-defendants and would cause great harm to the plaintiffs.

109. Plaintiffs show the court that the relief requested is for the purpose of preserving the status quo and that the burden imposed upon the defendants is reasonable and necessary for purposes of preserving the status quo and that the burden is far less than would be suffered by the plaintiffs if the status quo is not maintained during the course of the litigation.

110. Plaintiffs respectfully request that the Court accept this verified complaint as their affidavit for purposes of this Motion for Preliminary Injunction.

**PLAINTIFFS' SECOND MOTION FOR INJUNCTIVE RELIEF AGAINST**  
**DEFENDANTS**  
**TO PRESERVE THE STATUS QUO AND TO RESTRAIN A FORECLOSURE**  
**SALE DURING THE COURSE OF THIS LITIGATION, WHICH WOULD**  
**OTHERWISE CAUSE IRREPARABLE HARM TO PLAINTIFFS.**

111. All paragraphs of this complaint are incorporated herein as if fully restated.

112. Plaintiffs, through counsel and pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, respectfully move this Court for a Temporary Restraining Order prohibiting defendants from proceeding toward the foreclosure sale of plaintiffs' home and, in support of this motion, show the following: (i) plaintiffs have shown



through their Complaint and Affidavit, and will show at the hearing of this Motion, claims which have a substantial likelihood of success on the merits; (ii) that plaintiffs will suffer immediate and irreparable harm by virtue of losing title to their home through foreclosure sale before the adverse parties or their counsel can be heard in opposition to this Motion; (iii) that the potential injury to the plaintiffs is of such a nature that compensation alone will not make plaintiffs whole; (iii) that the restraint ordered imposes no undue burden or risk of harm to defendants; (iv) that balancing the risk of harm between the parties favors injunctive relief in favor of plaintiffs; (v) that time is of the essence, and that the bond, if applicable, will adequately protect defendants from any reasonable risk of harm by the restraint ordered while the underlying claims determining the rights of the parties are decided.

113. Plaintiffs' counsel undersigned certifies to the Court the efforts that have been made to give notice of this Motion to the adverse parties and the reasons supporting the claim that notice should not be required as follows:

114. Wherefore plaintiffs respectfully request that a Temporary Restraining Order be entered by the Court prohibiting the defendants from pursuing further proceedings toward the foreclosure sale of plaintiffs' home or otherwise ordering relief as the Court determines appropriate.

#### **REQUEST FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court:

1. Assume jurisdiction of this case;
2. Declare the security interest in Plaintiff's home void;
3. Rescind the transaction of May 5, 2006;



4. Order defendants to take all action necessary to terminate any security interest in plaintiffs' property created under the transaction and that the Court declare all such security interests void, including but not limited to the mortgage related to the transaction of May 5, 2006;

5. Order the return to the plaintiffs of any money or property given by the plaintiffs to anyone, including the defendants, in connection with the transaction;

6. Enjoin defendants during the pendency of this action, and permanently thereafter, from instituting, prosecuting, or maintaining foreclosure proceedings on the plaintiffs' property, from recording any deeds or mortgages regarding the property or from otherwise taking any steps to deprive plaintiffs of ownership of that property;

7. Award the plaintiffs statutory damages for the disclosure violations, in the amount of twice the finance charge in connection with this transaction, but not less than \$200 or more than \$2000 as provided under 15 U.S.C. § 1640(a);

8. Award the plaintiffs statutory damages for defendants' failure to respond properly to the plaintiffs' rescission notice, in the amount of twice the finance charge in connection with this transaction, but not less than \$200 or more than \$2000 as provided under 15 U.S.C. § 1640(a);

9. Order that, because the defendants failed to respond to the plaintiffs' notice of rescission, plaintiffs have no duty to tender, but in the alternative, if tender is required, determine the amount of the tender obligation in light of all of the plaintiffs' claims, and order the defendants to accept tender on reasonable terms and over a reasonable period of time;

10. Award actual damages in an amount to be established at trial;



11. Award the plaintiff costs and a reasonable attorney fee as provided under  
15 U.S.C. § 1640(a);

12. Award treble damages pursuant to N.C. Gen. Stat. §75-16;

13. Order a forfeiture of all interest under the loan transaction;

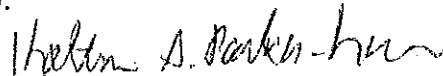
14. Award twice the amount of usurious interest pursuant to N.C. Gen. Stat. §  
24-2, et. seq.;

15. Grant plaintiffs injunctive relief as requested above;

16. Strike the Order of allowing the foreclosure sale;

17. Award such other and further relief as the Court deems just and proper.

This the 14<sup>th</sup> day of September 2009.



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Katherine S. Parker-Lowe  
Attorney for Plaintiffs  
NC Bar # 13318  
35 Miss Elecia Lane, Suite 101  
Post Office Box 730  
Ocracoke, North Carolina 27960  
252-928-1000  
252-928-3037

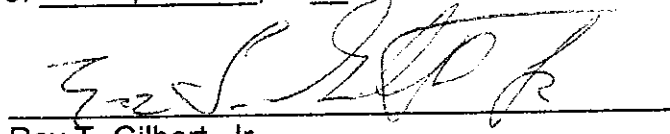


VERIFICATION

I, Rex T. Gilbert, Jr., being duly sworn, depose and say the following:

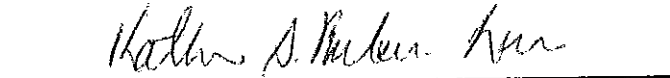
That the contents of the foregoing instrument are true to my own knowledge except matters stated on information and belief and as to those matters I believe them to be true.

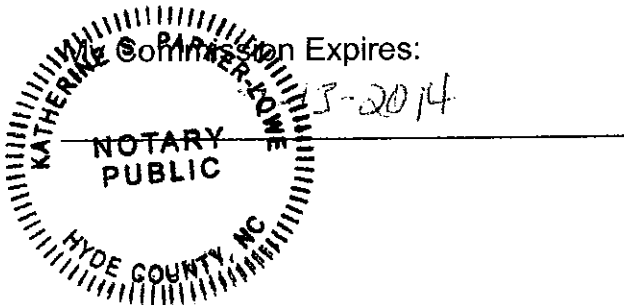
This the 12<sup>th</sup> day of Sept, 2009

  
Rex T. Gilbert, Jr.

Sworn and subscribed to before me

this 12<sup>th</sup> day of Sept, 2009

  
Notary Public







1665 W. Alameda Drive  
Tempe, AZ 85282  
Office (480) 224-8321 Fax 480-224-8522

ALLONGE TO NOTE

LOAN NUMBER: [REDACTED] 0343  
BORROWER: Gilbert JR  
IN THE AMOUNT OF: \$525,000.00

PAY TO THE ORDER OF:

First National Bank of  
Nevada

WITHOUT RECOURSE BY:

AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

Pay to The order Of  
**RESIDENTIAL FUNDING CORPORATION**

Without Recourse  
First National Bank of Nevada

By   
Deutsche Bank National Trust  
Company, f/k/a Bankers Trust  
Company of California, N. A.  
as Custodian as Attorney in  
Fact

Christopher Corcoran  
Vice President

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation

BY   
Judy Faber, Vice President



## ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In *The Wall Street Journal*) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

May 5, 2006  
[Date]

MCLEAN  
[City]

VA  
[State]

134 West End Road, Ocracoke, NC 27960  
[Property Address]

### 1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 525,000.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is **First National Bank of Arizona**

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

### 2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.375 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

### 3. PAYMENTS

#### (A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on July 1, 2006

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. BOX 62768, PHOENIX, AZ 85085-2768

or at a different place if required by the Note Holder.

#### (B) Amount of My Initial Monthly Payments See Attached Interest-Only Addendum here to and made a part here of.

Each of my initial monthly payments will be in the amount of U.S. \$ 4,391.32. This amount may change.

#### (C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

0843

MULTISTATE ADJUSTABLE RATE NOTE - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN *THE WALL STREET JOURNAL*) -  
Single Family - Fannie Mae UNIFORM INSTRUMENT

VMP-838N (0210)

Form 3520 1/01

VMP MORTGAGE FORMS - (800)521-7291

Page 1 of 4

Initials:           

P Ex. 2



(A) Change Dates

The interest rate I will pay may change on the first day of June, 2013, and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage points (2.750 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125 %). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 13.375 % or less than 2.750 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one percentage point(s) (1.000 %) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 13.375 %, OR LESS THAN 2.750 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

0843



**(A) Late Charges for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of **fifteen** calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be **4.000 %** of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

**(B) Default**

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

**(C) Notice of Default**

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

**(D) No Waiver By Note Holder**

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

**(E) Payment of Note Holder's Costs and Expenses**

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

**8. GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

**9. OBLIGATIONS OF PERSONS UNDER THIS NOTE**

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

**10. WAIVERS**

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

**11. UNIFORM SECURED NOTE**

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

0843



Transfer of the Property a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

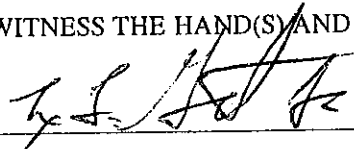
If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

CAUTION--IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

 _____ Rex T. Gilbert, JR	(Seal) _____ -Borrower	(Seal) _____ -Borrower
_____ -Borrower	(Seal) _____ -Borrower	(Seal) _____ -Borrower
_____ -Borrower	(Seal) _____ -Borrower	(Seal) _____ -Borrower
_____ -Borrower	(Seal) _____ -Borrower	(Seal) _____ -Borrower

[Sign Original Only]

0843



Loan Number: [REDACTED] 0843

Property Address: 134 West End Road, Ocracoke, NC 27960

**THIS ADDENDUM** is made this 5th day of May, 2006, and is incorporated into and intended to form a part of the Adjustable Rate Note (the "Note") dated the same date as this Addendum executed by the undersigned and payable to First National Bank of Arizona (the "Lender").

**THIS ADDENDUM** supersedes Sections 3(A), 3(B), 4(C) and 7(A) of the Note. None of the other provisions of the Note are changed by this addendum.

**3. PAYMENTS**

**(A) Time and Place of Payments**

I will pay interest by making payments every month for the first 120 payments (the "Interest-Only Period") in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 240 payments in an amount sufficient to fully amortize the outstanding principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments.

I will make my monthly payments on the first day of each month beginning on July 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at 1165 West Alameda Drive, Tempe, AZ 85282 or at a different place if required by the Note Holder.

**(B) Amount of My Initial Monthly Payments**

Each of my initial monthly payments will be in the amount of U.S. \$3,226.57. This payment amount is based on the original principal balance of the Note. This payment amount may change.

**4. INTEREST RATE AND MONTHLY PAYMENT CHANGES**

**(C) Calculation of Changes**

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage point(s) (2.750%) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.


During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment amount will not be reduced due to voluntary prepayments.

**7. BORROWER'S FAILURE TO PAY AS REQUIRED**

**(A) A Late Charge for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000% of my overdue payment of interest during the interest-only period, 4.000% of my overdue payment of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

Dated: 5/5/06

  
Rex T. Gilbert, JR.



# TRUTH-IN-LENDING DISCLOSURE STATEMENT

EX 4

12-12020-mg Dec 4767

Filed 08/20/13

Entered 08/20/13 17:52:12

Main Document

(THIS IS EITHER A CONTRACT, NOT A COMMITMENT TO LEND)

Pg 98 of 317

LENDER OR LENDER'S AGENT:

First National Bank of Arizona  
1760 Old Meadow Road  
Mc Lean, VA 22102

☐ Preliminary ☒ Final

DATE: 05/05/2006

LOAN NO.: 0843

Type of Loan: ARM

BORROWERS:

ADDRESS:

CITY/STATE/ZIP:

PROPERTY: 134 West End Road Ocracoke NC 27960

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
7.953 %	\$ 943,469.57	\$ 507,473.43	\$ 1,450,943.00

## PAYMENT SCHEDULE:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING	NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING
84	\$3,226.57	07/01/2006			
36	\$3,500.00	07/01/2013			
239	\$4,391.32	07/01/2016			
1	\$4,385.64	06/01/2036			

DEMAND FEATURE: ☒ This loan does not have a Demand Feature. ☐ This loan has a Demand Feature as follows:

## VARIABLE RATE FEATURE:

☒ This Loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier.



MAILING ADDRESS  
POST OFFICE BOX 730  
OCRACOKE, NC 27960  
E-MAIL: katherine@parker-lowe.net

TELEPHONE  
(252) 928-1000  
FACSIMILE  
(252) 928-3037

April 5, 2009

Holder of Loan # [REDACTED] 2713  
c/o Ms. Lauren S. Thurmond  
Kellam & Pettit, P.A.  
2701 Coltsgate Road  
Suite 300  
Charlotte, North Carolina 28211

Re: In the Matter of the Foreclosure....Gilbert  
Hyde County File 09-SP-9  
Rex T. Gilbert, Jr.  
134 West End Road  
Post Office Box 754  
Ocracoke, North Carolina 27960

Dear Ms. Thurmond:

As you are aware, I represent Mr. Gilbert concerning the loan transaction which he entered into with First National Bank of Arizona on May 5, 2006. I have been authorized by my clients to rescind this transaction and hereby exercise that right pursuant to the Federal Truth in Lending Act, 15 U.S.C. § 1635, Regulation Z § 226.23.

The disclosure statement failed to provide all the required material disclosures correctly, including, but not limited to:

- (a) The disclosed payment schedule does not match the note;
- (b) The stated APR is more than one-eighth of one-percent off;
- (c) The total of payments is not correct;
- (d) The total of payments results in a higher APR than the disclosed APR
- (e) The disclosures do not match the note or the addendum to the note.

The security interest is void upon our rescission. See 15 U.S.C. § 1635; Regulation Z § 226.23. Pursuant to the Regulation, you have twenty days after receipt of this notice of rescission to return to my client all monies paid and to take action necessary or appropriate to reflect termination of the security interest.

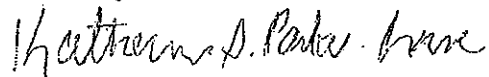
We are prepared to discuss a tender obligation, should it arise, and satisfactory ways in which my client may meet this obligation. Please be advised that if you do not cancel



the security interest and return all consideration paid by my client within 20 days of receipt of this letter, you will be responsible for actual and statutory damages pursuant to 15 U.S.C. § 1640(a).

Please send me a copy of my client's payment history and other documents showing the loan disbursements, loan charges, payments made, and current principal balance due.

Sincerely,



Katherine S. Parker-Lowe

KPL/mpc

cc: Mr. and Mrs. Rex T. Gilbert, Jr.



**GMAC ResCap**

April 24, 2009

Katherine Parker-Lowe  
Attorney at Law  
2 Beach Lane  
Ocracoke, NC 27960

Re: Rex Gilbert, Jr.  
Loan number # [REDACTED] 2713 ("Loan")

Dear Ms. Parker-Lowe:

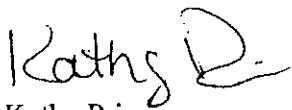
We are writing in response to your correspondence to GMAC Mortgage, LLC requesting rescission of the loan transaction your client entered into with First National Bank of Arizona on May 5, 2006.

We have reviewed your client's loan file and find no basis to conclude that there were any material disclosure errors that would give rise to an extended right of rescission.

Consequently, we will not rescind the Loan transaction at this time.

If you have any documents or further information that sets forth the basis of the demand, please contact me at the address below.

Sincerely,



Kathy Priore  
Associate Counsel

cc: Lauren Thurmond, Kellam & Pettit, PA



#### YOUR RIGHT TO CANCEL

You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

- (1) The date of the transaction, which is  
or
- (2) The date you received your Truth In Lending disclosures;  
or
- (3) The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

#### HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

First National Bank of Arizona

MS AZ-4003-078

1665 W. Alameda Drive

Tempe, AZ 85282-3200

Or Fax to: (602) 636-7096

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of  
(or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

#### I WISH TO CANCEL

CONSUMER'S SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

Each of the borrowers/owners in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective as to all borrowers/owners.

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL

X *Rex T. Gilbert, JR* 5/5/06 X  
BORROWER/OWNER Rex T. Gilbert, JR DATE BORROWER/OWNER DATE

X *Daniela L. Gilbert* 5/5/06 X  
BORROWER/OWNER Daniela L. Gilbert DATE BORROWER/OWNER DATE

#### CONFIRMATION CERTIFICATE

##### DO NOT SIGN UNTIL THREE BUSINESS DAYS HAVE ELAPSED

Three business days have elapsed since the undersigned have received two copies of this document. Each of the undersigned hereby certify and warrant that they have not exercised any right which they may have to rescind the transaction, that they do not desire to do so, and that they ratify and confirm the transaction in all respects.

BORROWER/OWNER Rex T. Gilbert, JR DATE BORROWER/OWNER DATE

BORROWER/OWNER Daniela L. Gilbert DATE BORROWER/OWNER DATE

0843

VMP -66 (0305).01

VMP Mortgage Solutions (800)521-7291

10/00

PEX 1



STATE OF NORTH CAROLINA

File No. 09 CVS 70

HYDE County

In The General Court Of Justice  
☐ District ☒ Superior Court Division

Name Of Plaintiff

REX T. GILBERT, JR. AND DANIELA L. GILBERT

Address

C/O POST OFFICE BOX 730

City, State, Zip

OCRACOKE, NC 27960

VERSUS

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS

G.S. 1A-1, Rules 3, 4

Name Of Defendant(s)

DEUTSCHE BANK TRUST COMPANY AMERICAS, As Trustee  
for, RESIDENTIAL ACCREDIT LOANS, INC., DAVID  
A. SIMPSON, P.C., Substitute Trustee, RESIDENTIAL FUNDING,  
LLC, and GMAC MORTGAGE, LLC,

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

RESIDENTIAL FUNDING, LLC  
C/O KELLAM & PETTIT, P.A. AND JOHN T. BENJAMIN  
AND DAVID A. SIMPSON, P.A.

Name And Address Of Defendant 2

GMAC MORTGAGE, LLC  
C/O KELLAM & PETTIT, P.A. AND JOHN T. BENJAMIN  
AND DAVID A. SIMPSON, P.A.

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)

Katherine S. Parker-Lowe  
35 Miss Elecia Lane, Suite 101  
Post Office Box 730  
Ocracoke, NC 27960

Date Issued

9-14-09

Time

10:15

☒ AM ☐ PM

Signature

Maria H. Slade

☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

☐ ENDORSEMENT

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement

Time

☐ AM ☐ PM

Signature

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

**NOTE TO PARTIES:** Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.



**RETURN OF SERVICE**

I certify that this Summons and a copy of the complaint were received and served as follows:

**DEFENDANT 1**

Date Served	Time Served <input type="checkbox"/> AM <input type="checkbox"/> PM	Name Of Defendant
-------------	--	-------------------

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service (specify)

☐ Defendant WAS NOT served for the following reason:

**DEFENDANT 2**

Date Served	Time Served <input type="checkbox"/> AM <input type="checkbox"/> PM	Name Of Defendant
-------------	--	-------------------

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service (specify)

☐ Defendant WAS NOT served for the following reason.

Service Fee Paid \$	Signature Of Deputy Sheriff Making Return
Date Received	Name Of Sheriff (Type Or Print)
Date Of Return	County Of Sheriff



STATE OF NORTH CAROLINA

File No. 09CVS 70

HYDE County

In The General Court Of Justice  
☐ District ☒ Superior Court Division

Name Of Plaintiff  
REN T. GILBERT, JR. AND DANIELA L. GILBERT

Address  
C/O POST OFFICE BOX 730  
City, State, Zip  
OCRA COKE, NC 27960

**CIVIL SUMMONS**  
☐ ALIAS AND PLURIES SUMMONS

G.S. 1A-1, Rules 3. 4

**VERSUS**

Name Of Defendant(s)  
DEUTSCHE BANK TRUST COMPANY AMERICAS, As Trustee  
for, RESIDENTIAL ACCREDIT LOANS, INC., DAVID  
A. SIMPSON, P.C., Substitute Trustee, RESIDENTIAL FUNDING,  
L.L.C. and GMAC MORTGAGE, LLC.

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

**To Each Of The Defendant(s) Named Below:**

Name And Address Of Defendant 1  
DEUTSCHE BANK TRUST COMPANY AMERICAS,  
AS TRUSTEE FOR RESIDENTIAL ACCREDIT LOANS, INC.  
C/O KILLAM & PETTIT, P.A. AND JOHN T. BENJAMIN

Name And Address Of Defendant 2  
DAVID A. SIMPSON, P.A.  
7804 Fairview Road, #225  
Charlotte, NC 28226

**A Civil Action Has Been Commenced Against You!**

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If None, Address Of Plaintiff)  
Katherine S. Parker-Lowe  
35 Miss Eilecia Lane, Suite 101  
Post Office Box 730  
Ocracoke, NC 27960

Date Issued 9-14-09 Time 10:15 ☒ AM ☐ PM  
Signature Maria H. Linder  
☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

☐ **ENDORSEMENT**

This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement Time ☐ AM ☐ PM  
Signature  
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

**NOTE TO PARTIES:** Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is \$15,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.



RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served \_\_\_\_\_ Time Served \_\_\_\_\_ ☐ AM ☐ PM Name Of Defendant \_\_\_\_\_

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service (specify)

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served \_\_\_\_\_ Time Served \_\_\_\_\_ ☐ AM ☐ PM Name Of Defendant \_\_\_\_\_

- ☐ By delivering to the defendant named above a copy of the summons and complaint.
- ☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.
- ☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service (specify)

☐ Defendant WAS NOT served for the following reason.

Service Fee Paid \$ _____	Signature Of Deputy Sheriff Making Return _____
Date Received _____	Name Of Sheriff (Type Or Print) _____
Date Of Return _____	County Of Sheriff _____



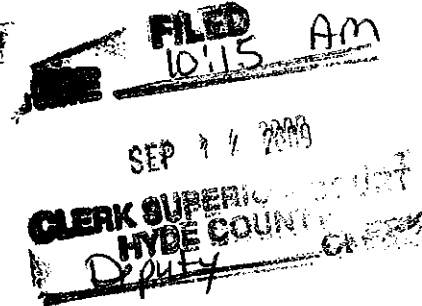
STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

REX T. GILBERT, JR. and  
DANIELA L. GILBERT,  
Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS, *As Trustee for*,  
RESIDENTIAL ACCREDIT LOANS, INC.,  
DAVID A. SIMPSON, P.C., Substitute Trustee,  
RESIDENTIAL FUNDING, LLC, and  
GMAC MORTGAGE, LLC,  
Defendants.



AFFIDAVIT OF KEITH PARKER-LOWE

I, Keith Parker-Lowe, being first duly sworn, aver and say as follows:

1. I am President and CEO of KPL, Inc. a software development company and system integrator for county governments in the mid-Atlantic located and doing business in Ocracoke, North Carolina.
2. I completed training for the business planning department of AETNA Life and Casualty. This course of study included calculations, financial yields, actuarial tables, compound interest tables, statistics, and financial plotting and modeling.
3. I completed training for and obtained a Securities and Exchange Commission Brokers License
4. I am a licensed Realtor in North Carolina. The course study included not only the study of financial calculations for mortgage loans and installment loans but the



actual preparation of the financial calculations required for making these loans and making accurate disclosures to consumers on these loans.

5. I completed Canon's computer programming school in 1973.

6. I wrote the financial programs and several operating manuals for Sharp Electronics on installment loan calculations and amortization schedules.

7. I created computer programs for installment loan calculations to meet the compliance requirements of Truth in Lending for various banks and lending institutions including The Federal Land Bank, PCA and Southern National Bank and Bank of Montgomery, Bank of Raeford and NCNB.

8. I created computer programs to calculate installment loans, amortization schedules, mortgage loans, APR's, and special compound interest calculations for Canon, Sharp and the Federal Reserve.

9. I have created and used various programs to review and check the finance charges against the stated APR, terms, interest, payments and repayment schedule.

10. I worked closely with the Federal Reserve to implement the Federal Truth in Lending Act and Regulation Z to assist many banks in meeting compliance requirements.

11. Over the last several years I have gained experience in drafting and understanding compliance issues for profit sharing and various investment vehicles. This experience has proven invaluable in checking and verifying financial accounts of all types.



12. I previously testified on behalf of Ms. Parker-Lowe in Irene Britt v. Thomas Jones, 123 N.CApp. 108, 472 S.E.2d 199 (1996). This case was originally filed in Hertford County, North Carolina.

13. Based upon my testimony, the Court of Appeals upheld the application of monthly payments to interest first and principal second.

14. Since February 1990, I have reviewed numerous loan agreements, promissory notes, schedules of payments on notes, mortgages, Truth in Lending Disclosure Statements (TIL), and related documents related to actions pending in the North Carolina trial courts and before the U.S. Bankruptcy Court for the Eastern District of North Carolina.

15. I have reviewed ledgers, amortization schedules, repayment schedules, deeds, deeds of trust, land surveys, paper documents, and electronic records for compliance with Truth in Lending and the state usury laws.

16. At Ms. Parker-Lowe's request, I have familiarized myself with the Gilberts' promissory note, interest only addendum to the promissory note and the federal Truth in Lending disclosure statement.

17. At Ms. Parker-Lowe's request, I compared the payment schedules set forth in the promissory note, the addendum to the promissory note and the one set forth in the federal Truth in Lending disclosure statement.

18. The payment schedule set forth in the Truth in Lending disclosure statement does not match either the promissory note or the interest only addendum to the promissory note.



19. After reviewing the documents and determining that the TIL payment schedule did not match either the promissory note or the interest only addendum to the promissory note, I examined the other Truth in Lending mandated disclosures and calculated the APR.

20. The APR using the information disclosed in the TIL results in an APR of 9% not the 7.953% as disclosed to the Gilberts.

21. The Gilberts could have had a repayment schedule with 240 equal successive installments after the interest only period of approximately \$4189.33. The APR would have been incorrect in this case also.

22. The Truth in Lending disclosure statement payment schedule results in an additional \$100,000.00+ interest.

23. In the Interest-Only Addendum to the Gilbert promissory note, Loan 5300000843, in paragraph 4.(C), the Addendum states: After the end of the Interest-only Period, my payment amount will not be reduced due to voluntary prepayments. This statement results in a contradiction: voluntary prepayments after the interest only period will either not be allowed or will not reduce the amount of principal. In my opinion, this is contrary to existing law.

24. Whereas in the Fannie Mae Uniform Instrument note allows for voluntary prepayment by stating that the maturity date will be accelerated as follows: "However, if the partial Prepayment is made during the period when my monthly payments consist only of interest, the amount of the monthly payment will decrease for the remainder of the term when my payments consist only of interest as well as during the time that my payments consist of principal and interest. If the partial Prepayment is made during the



period when my payments consist of principal and interest, the amount of my monthly payment will not decrease; however, the principal and interest required under this Note will be paid prior to the Maturity Date.

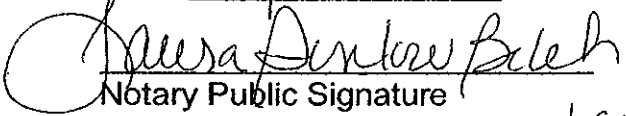
This the 15 day of September 2009.

  
\_\_\_\_\_  
Keith Parker-Lowe

Hyde County, North Carolina

Sworn to and subscribed before me this day by Keith Parker-Lowe

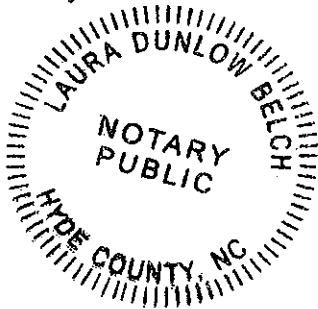
Date: September 15, 2009

  
\_\_\_\_\_  
Notary Public Signature

Notary's printed or typed name: Laura Dunlow Belch

(SEAL)

My Commission Expires: 10-13-2013





STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

REX T. GILBERT, JR. and  
DANIELA L. GILBERT,  
Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS, *As Trustee for*,  
RESIDENTIAL ACCREDIT LOANS, INC.,  
DAVID A. SIMPSON, P.C., Substitute Trustee,  
RESIDENTIAL FUNDING, LLC, and  
GMAC MORTGAGE, LLC,  
Defendants.

RESTRAINING ORDER

This cause was heard by the undersigned judge upon the application of plaintiffs for a restraining order. It appears that this Court should grant a Temporary Restraining Order prohibiting defendants from proceeding toward the foreclosure sale of plaintiffs' home; plaintiff have shown the following: (i) plaintiffs have shown through their Complaint and Affidavit, and will show at the hearing of this Motion, claims which have a substantial likelihood of success on the merits; (ii) that plaintiffs will suffer immediate and irreparable harm by virtue of losing title to their home through foreclosure sale before the adverse parties or their counsel can be heard in opposition to this Motion; (iii) that the potential injury to the plaintiffs is of such a nature that compensation alone will not make plaintiffs whole; (iii) that the restraint ordered imposes no undue burden or risk of harm to defendants; (iv) that balancing the risk of harm between the parties favors injunctive relief in favor of plaintiffs; (v) that time is of the essence, and that the bond, if applicable, will adequately protect defendants from any reasonable risk of harm by the



restraint ordered while the underlying claims determining the rights of the parties are decided.

Further, the court should enjoin these defendants from conveying or assigning any interest in the mortgage loan that is the subject of this litigation until and unless otherwise allowed by Court Order.


It further appears that plaintiff has made bond, with sufficient surety, in the amount of ~~\$250.00~~<sup>3000.00</sup> Dollars to secure the defendant from damages for the restraining order prayed.

IT IS THEREFORE ORDERED that the defendant be and hereby are restrained from proceeding toward the foreclosure sale of plaintiffs' home and from conveying or assigning any interest in the mortgage loan.

IT IS FURTHER ORDERED that a copy of this Restraining Order be served upon the defendants in the manner now provided for service of process.

This restraining order shall expire ~~within~~<sup>on</sup> Sept. 25, 2009 unless extended by further order of court or by consent.

This the 14 day of September 2009. at 2:29pm

  
\_\_\_\_\_  
The Honorable Wayland J. Sermons, Jr.  
Resident Superior Court Judge Presiding



STATE OF NORTH CAROLINA  
COUNTY OF HYDE


IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70\_\_\_\_

REX T. GILBERT, JR. and )  
DANIELA L. GILBERT, )  
Plaintiffs, )  
v. )  
DEUTSCHE BANK TRUST COMPANY )  
AMERICAS, *As Trustee for*, )  
RESIDENTIAL ACCREDIT LOANS, INC, )  
DAVID A. SIMPSON, P.C., Substitute Trustee, )  
RESIDENTIAL FUNDING, LLC, and )  
GMAC MORTGAGE, LLC, )  
Defendants. )  
\_\_\_\_\_ )

NOTICE OF HEARING

Please be notified that a hearing will be held at the Pitt County Courthouse, Greenville, North Carolina on Thursday, September 24, 2009 at 2:00 p.m., or as soon thereafter as the matter may be reached by the Court, upon the Plaintiff's Motion for Preliminary Injunction and return on Temporary Restraining Order entered on September 14, 2009. You are notified to attend and present evidence to the Court. Your failure to attend this hearing may result in an adverse ruling by the Court in your absence.

This the 18<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
Katherine S. Parker-Lowe  
Attorney for Plaintiffs  
NC State Bar #13318  
35 Miss Elecia Lane, Suite 101  
Post Office Box 730  
Ocracoke, North Carolina 27960  
252-928-1000  
252-928-3037 fax



### CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause by:

       Hand delivering a copy hereof to each said party or his/her attorney.

  X   Depositing a copy hereof, postage prepaid in the United States Mail, properly addressed as disclosed by the pleadings on record herein to each said party or his/her attorney.

  X   Telefacsimile transmittal, which was received by 5:00 p.m. Eastern time, as evidenced by the attached telefacsimile receipt confirmation to each said party or his/her attorney.

Ms. Lauren S. Thurmond  
Kellam & Pettit, P.A.  
2701 Coltsgate Road  
Suite 300  
Charlotte, North Carolina 28211

David A. Simpson  
Kellam Simpson Loffin & Poe  
2901 Coltsgate Road, Suite 102  
Charlotte, North Carolina 28211

John T. Benjamin, Jr.  
712 West North Street  
Raleigh, North Carolina 27602

This the 18<sup>th</sup> day of September, 2009.



---

Katherine S. Parker-Lowe



STATE OF NORTH CAROLINA      IN THE GENERAL COURT OF JUSTICE  
COUNTY OF HYDE                      SUPERIOR COURT DIVISION  
    BEFORE THE CLERK  
    09 SP 9

IN THE MATTER OF THE FORECLOSURE by      )  
David A. Simpson, P.C., Substitute Trustee, of      )  
Deed of Trust Executed by Rex T. Gilbert, Jr.      )  
and Daniela L. Gilbert, Husband and Wife and      )  
recorded on May 10, 2006, in Book 219 at Page      )  
53 of the Hyde County Public Registry      )  
\_\_\_\_\_ )

**REVISED CERTIFICATE OF SERVICE**

I, Katherine S. Parker-Lowe, Attorney at Law, attorney for Plaintiffs, do hereby certify that I have served a copy of this Notice of Appeal to the North Carolina Court of Appeals by U.S. Mail in the manner prescribed by Rule 5 of the North Carolina Rules of Civil Procedure upon opposing counsel as follows:

Ms. Lauren S. Thurmond  
Kellam & Pettit, P.A.  
2701 Coltsgate Road  
Suite 300  
Charlotte, North Carolina 28211

David A. Simpson  
Kellam Simpson Loflin & Poe  
2901 Coltsgate Road, Suite 102  
Charlotte, North Carolina 28211

John T. Benjamin, Jr.  
712 West North Street  
Raleigh, North Carolina 27602

This the 21<sup>st</sup> day of Sept., 2009.

  
\_\_\_\_\_  
Katherine S. Parker-Lowe



STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
BEFORE THE CLERK  
09 SP 9

IN THE MATTER OF THE FORECLOSURE by )  
David A. Simpson, P.C., Substitute Trustee, of )  
Deed of Trust Executed by Rex T. Gilbert, Jr. )  
and Daniela L. Gilbert, Husband and Wife and )  
recorded on May 10, 2006, in Book 219 at Page )  
53 of the Hyde County Public Registry )  
\_\_\_\_\_ )

NOTICE OF APPEAL  
TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA  
\*\*\*\*\*

NOW COME Respondents, Rex T. Gilbert, Jr. and Daniela L. Gilbert, pursuant to  
N.C. Gen. Stat. § 1-279.1 and Rule 3 of the North Carolina Rules of Appellate  
Procedure and give notice of appeal to the Court of Appeals of North Carolina of  
the order in this action which was entered on August 18, 2009, allowing  
Foreclosure Sale.

Respectfully submitted this the 16<sup>th</sup> day of September 2009.

*Katherine S. Parker-Lowe*

Katherine S. Parker-Lowe  
Attorney for Respondents  
NC State Bar #13318  
Post Office Box 730  
Ocracoke, North Carolina 27960  
252-928-1000  
katherine@parker-low.net

FILED  
2009 SEP 16 PM 2:18  
HYDE COUNTY C.L.C.  
BY *SA*



STATE OF NORTH CAROLINA  
COUNTY OF HYDE

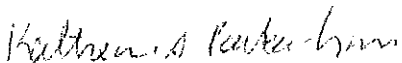
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

REX T. GILBERT, JR. and )  
DANIELA L. GILBERT, )  
Plaintiffs, )  
 )  
v. )  
 )  
DEUTSCHE BANK TRUST COMPANY )  
AMERICAS, *As Trustee for*, )  
RESIDENTIAL ACCREDIT LOANS, INC, )  
DAVID A. SIMPSON, P.C., Substitute Trustee, )  
RESIDENTIAL FUNDING, LLC, and )  
GMAC MORTGAGE, LLC, )  
Defendants. )  
\_\_\_\_\_ )

### NOTICE OF HEARING

Please be notified that a hearing will be held at the Pitt County Courthouse, in Superior Court Room #1, Greenville, North Carolina, on Thursday, October 1, 2009 at 11:00 a.m., or as soon thereafter as the matter may be reached by the Court, upon the Plaintiffs' Motion for Preliminary Injunction and return on Temporary Restraining Order entered on September 14, 2009. You are notified to attend and present evidence to the Court. Your failure to attend this hearing may result in an adverse ruling by the Court in your absence.

This the 28<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
Katherine S. Parker-Lowe  
Attorney for Plaintiffs  
NC State Bar #13318  
35 Miss Elecia Lane, Suite 101  
Post Office Box 730  
Ocracoke, North Carolina 27960  
252-928-1000  
252-928-3037 fax



STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

REX T. GILBERT, JR. and )  
DANIELA L. GILBERT, )  
Plaintiffs, )  
v. )  
DEUTSCHE BANK TRUST COMPANY )  
AMERICAS, *As Trustee for*, )  
RESIDENTIAL ACCREDIT LOANS, INC, )  
DAVID A. SIMPSON, P.C., Substitute Trustee, )  
RESIDENTIAL FUNDING, LLC, and )  
GMAC MORTGAGE, LLC, )  
Defendants. )

CERTIFICATE OF SERVICE

I, Katherine S. Parker-Lowe, Attorney at Law, attorney for Plaintiffs, do hereby certify that I have served a copy of this Notice of Hearing by facsimile, electronic transmission and U.S. Mail in the manner prescribed by Rule 5 of the North Carolina Rules of Civil Procedure upon opposing counsel as follows:

John T. Benjamin, Jr.  
712 West North Street  
Raleigh, North Carolina 27602

This the 25<sup>th</sup> day of September, 2013

  
Katherine S. Parker-Lowe



NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

HYDE COUNTY

REX T. GILBERT, JR. AND  
DANIELA L. GILBERT,

PLAINTIFFS,

v.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS, AS TRUSTEE FOR  
RESIDENTIAL ACCREDIT LOANS,  
INC. DAVID A SIMPSON, P.C.,  
SUBSTITUTE TRUSTEE,  
RESIDENTIAL FUNDING, LLC  
AND GMAC MORTGAGE, LLC  
DEFENDANTS.

AFFIDAVIT

Scott Zeitz, first being duly sworn, deposes and says  
as follows:

1. I am over the age of 21 and competent to testify as to  
all matters contained in this affidavit.

2. I have personal knowledge of all matters contained in  
this affidavit.

3. I work for GMAC Mortgage, LLC (herein "GMAC") in the  
capacity as Litigation Analyst. GMAC is the current sub-  
servicer of the note and deed of trust at issue in this matter.  
Deutsche Bank Trust Company Americas as Trustee for Residential  
Accredit Loans, Inc. Series 2006-QA6 (herein "Deutsche") is the



current owner and holder of the note and deed of trust at issue in this matter.

4. In the course of my day-to-day duties, I work with documents that relate to account histories and account balances of particular loans. I am familiar with the account of Rex T. Gilbert, Jr. (herein collectively the "Borrower" or "Gilbert") which has a loan number of [REDACTED] 2713 (herein "Mortgage Loan Account").

5. On May 5, 2006 Gilbert borrowed \$525,000.00 to re-finance the lien on certain property located in Hyde County, North Carolina at 134 West End Road, Ocracoke, NC 27960.

6. As part of this transaction the Borrower signed a note (herein "Note"). A true and accurate copy of the note is attached hereto as **EXHIBIT 1**.

7. On May 5, 2006 the Borrower signed an addendum to the Note. The addendum supersedes sections 3(A), 3(B), 4(c), and 7(A) of the Note. A true and accurate copy of the addendum to the Note is attached and incorporated hereto as **EXHIBIT 2**.

8. The addendum to the Note contains a provision in Paragraph 3(A) entitled "Time and Place of Payments" which reads in pertinent part:

I will pay interest by making payments every month for the first 120 months in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 240 months in an amount sufficient to fully amortize the outstanding



principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments.

I will make my monthly payments on the 1<sup>st</sup> day of each month beginning on July 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date"...

9. The addendum to the Note also contains a provision in Paragraph 3(B) entitled "Amount of My Initial Monthly Payments" which reads:

Each of my initial monthly payments will be in the amount of U.S. \$3226.57. This payment amount is based on the original principal balance of the Note. This payment amount may change.

10. The Note contains a provision in Paragraph 3(c) entitled "Monthly Payment Changes" which reads:

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

11. The Note is an adjustable rate note. Paragraph 4(A) of the Note provides that the interest rate may change on June 1, 2013 (herein "first change date"), which would be the first possible change date. If the interest rate does change then the amount for each monthly payment will change accordingly.



12. There is a provision in Paragraph 7(B) entitled "Default" which reads:

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

13. The Borrower and his wife, Daniela L. Gilbert, also signed a deed of trust on May 5, 2006, that secured the loan amount of \$525,000.00 on the subject property and lists First National Bank of Arizona as the Lender (herein "Deed of Trust"). This Deed of Trust was recorded on May 10, 2006 in Book 219, Page 53 in the Hyde County Register of Deeds. A true and accurate copy of the Deed of Trust is attached and incorporated hereto as **EXHIBIT 3**.

14. First National Bank of Arizona sold, assigned and transferred all of its right, title and interest in and to the Note and Deed of Trust to First National Bank of Nevada. This is reflected on the Allonge to the Note, a true and accurate copy of which is attached and incorporated hereto as **EXHIBIT 4**.

15. First National Bank of Nevada sold, assigned and transferred all of its right, title and interest in and to the Note and Deed of Trust to Residential Funding Corporation. This is reflected on the Allonge to the Note, a true and accurate copy of which is attached and incorporated hereto as **EXHIBIT 4**.

16. Residential Funding Corporation sold, assigned and transferred all of its right, title and interest in and to the



Note and Deed of Trust to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. This is reflected on the Allonge to the Note, a true and accurate copy of which is attached and incorporated hereto as **EXHIBIT 4.**

17. Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust. It currently has possession of the original Note and has provided such to its counsel. The original Note will be available at the Preliminary Injunction Hearing in this matter for the Court's inspection and the Borrower's inspection.

18. Deutsche purchased this loan from the previous owner and holder of the Note and Deed of Trust, Residential Funding Corporation.

19. The origination file for the Mortgage Loan Account contained a "Truth in Lending Disclosure Statement." A true and accurate copy of the "Truth in Lending Disclosure Statement" is attached and incorporated hereto as **EXHIBIT 5.**

20. The origination file for the Mortgage Loan Account contained a "Notice of Right to Cancel." A true and accurate copy of the "Notice of Right to Cancel" is attached and incorporated hereto as **EXHIBIT 6.**



21. The "Notice of Right to Cancel" attached as **EXHIBIT 6** has a provision within it that states:

The undersigned each acknowledge receipt of two copies of NOTICE OF RIGHT TO CANCEL

22. The origination file for the Mortgage Loan Account contained a "Variable Rate Mortgage Program Disclosure." A true and accurate copy of the "Variable Rate Mortgage Program Disclosure" is attached and incorporated hereto as **EXHIBIT 7.**

23. The origination file for the Mortgage Loan Account contained a "HUD-1 Settlement Statement." A true and accurate copy of the "HUD-1 Settlement Statement" is attached hereto as **EXHIBIT 8.**

24. The origination file for the Mortgage Loan Account contained a "First Payment Letter." A true and accurate copy of the "First Payment Letter" is attached and incorporated hereto as **EXHIBIT 9**

25. The Borrowers are currently in the "interest only" period of their note.

26. The amount of their interest only payments had not yet changed.

27. They are currently required to make monthly interest only payments of \$3226.57.



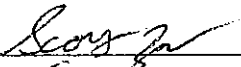
28. They are required to make one hundred and twenty (120) interest only payments. Payment eight-five (85) will be due on or after the First Change Date.

29. Payment eight-five (85) will be either higher or lower depending on the interest rate change on the First Change Date.

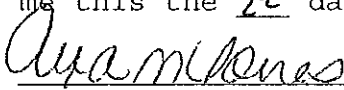
30. I have reviewed the business records of the Mortgage Loan Account and determined that there has been a default in the payments required under the Note and Deed of Trust. The last payment prior to acceleration of the amount due under the Mortgage Loan Account was received and accepted on or about July 9, 2008. This payment was applied to the monthly interest payment amount of Three Thousand Two Hundred Twenty-Six Dollars and Fifty-Seven cents (\$3,226.57) that was due on April 1, 2008. I have attached the Mortgage Loan Account History showing how payments were made and applied as **EXHIBIT 10**.

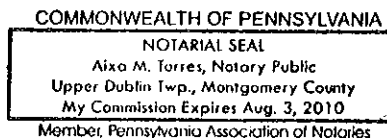
31. Further affiant sayeth not.

This the 22 day of September, 2009

  
\_\_\_\_\_  
Scott Zetser

Sworn to and subscribed before  
me this the 22 day of September, 2009.

  
\_\_\_\_\_  
Notary Public  
My commission expires:



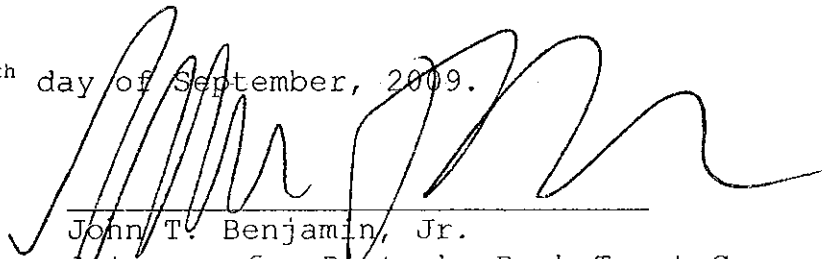


CERTIFICATE OF SERVICE

I, John T. Benjamin, Jr., of The Law Office of John T. Benjamin, Jr., P.A., attorney for Deutsche Bank Trust Company Americas as Trustee for Residential Credit Loans, Inc, Residential Funding, LLC and GMAC Mortgage, LLC do hereby certify that I served a copy of the foregoing document upon the other parties in this action by hand delivery on Thursday, September 24, 2009 as follows:

Katherine S. Parker-Lowe  
Attorney at Law  
35 Miss Elecia Lane, Ste. 101  
Post Office Box 730  
Ocracoke, North Carolina 27960

This the 25<sup>th</sup> day of September, 2009.



\_\_\_\_\_  
John T. Benjamin, Jr.  
Attorney for Deutsche Bank Trust Company,  
Residential Funding, LLC and  
GMAC Mortgage, LLC



## ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In The Wall Street Journal) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

May 3, 2006  
(Date)

MOORE  
(City)

VA  
(State)

134 West End Road, Ocooke, NC 27960  
(Property Address)

### 1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$525,000.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is First National Bank of Arizona

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

### 2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 7.375 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

### 3. PAYMENTS

#### (A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on July 1, 2006

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at P.O. BOX 62768, PHOENIX, AZ 85085-2768

or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments See Attached Interest-Only Addendum here to and made a part here of.

Each of my initial monthly payments will be in the amount of U.S. \$4,391.32. This amount may change.

#### (C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

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MULTISTATE ADJUSTABLE RATE NOTE - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN THE WALL STREET JOURNAL) -  
Single Family - Fannie Mae UNIFORM INSTRUMENT



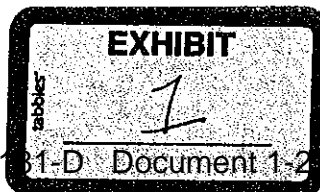
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Form 3520 1/01

VMP MORTGAGE FORMS - (800)521-7291

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Initials: R. H.





**4. INTEREST RATE AND MONTHLY PAYMENT CHANGES****(A) Change Dates**

The interest rate I will pay may change on the first day of June, 2013, and on that day every 6th month thereafter. Each date on which my interest rate would change is called a "Change Date."

**(B) The Index**

Beginning with the first Change Date, my interest rate will be based on an index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

**(C) Calculation of Changes**

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage points (2.750 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

**(D) Limits on Interest Rate Changes**

The interest rate I am required to pay at the first Change Date will not be greater than 13.375 % or less than 2.750 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one percentage point(s) (1.000 %) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 13.375 %, OR LESS THAN 2.750 %.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes**

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

**5. BORROWER'S RIGHT TO PREPAY**

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

**6. LOAN CHARGES**

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

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Initials: RTB



**7. BORROWER'S FAILURE TO PAY AS REQUIRED****(A) Late Charges for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

**(B) Default**

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

**(C) Notice of Default**

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

**(D) No Waiver By Note Holder**

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

**(E) Payment of Note Holder's Costs and Expenses**

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

**8. GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

**9. OBLIGATIONS OF PERSONS UNDER THIS NOTE**

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

**10. WAIVERS**

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

**11. UNIFORM SECURED NOTE**

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

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Initials: RTG



**Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 13, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

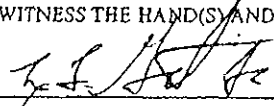
If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

**CAUTION-IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.**

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

  
\_\_\_\_\_  
Rex T. Gilbert, JR. (Seal) \_\_\_\_\_ (Seal)  
-Borrower -Borrower

\_\_\_\_\_  
(Seal) (Seal)  
-Borrower -Borrower

\_\_\_\_\_  
(Seal) (Seal)  
-Borrower -Borrower

\_\_\_\_\_  
(Seal) (Seal)  
-Borrower -Borrower

*(Sign Original Only)*

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12/10/08 838N 102101

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Form 3520 1/01





1651 W. Alameda Drive  
Tempe, AZ 85282  
Office (480) 224-8521 Fax 480-224-8512

ALLONGE TO NOTE

LOAN NUMBER: [REDACTED] 00343  
BORROWER: Gilbert JR  
IN THE AMOUNT OF: \$525,000.00

PAY TO THE ORDER OF:

First National Bank of  
Nevada

WITHOUT RECOURSE BY:

AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

Pay to The order of  
**RESIDENTIAL FUNDING CORPORATION**

Without Recourse  
First National Bank of Nevada

By   
Deutsche Bank National Trust  
Company, f/k/a Bankers Trust  
Company of California, N. A.  
as Custodian as Attorney in  
Fact

Christopher Corcoran  
Vice President

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation

BY   
Judy Faber, Vice President



INTEREST-BEARING  
TO ADJUSTABLE RATE PROMISSORY NOTE

Loan Number: [REDACTED] 0842

Property Address: 114 West End Road, Ocoee, NC 27651

THIS ADDENDUM is made this 5th day of May, 2006, and is incorporated into and intended to form a part of the Adjustable Rate Note (the "Note") dated the same date as this Addendum executed by the undersigned and payable to First National Bank of Arizona (the "Lender").

THIS ADDENDUM supersedes Sections 1(A), 2(B), 4(C) and 7(A) of the Note. None of the other provisions of the Note are changed by this addendum.

**3. PAYMENTS****(A) Time and Place of Payments**

I will pay interest by making payments every month for the first 120 payments (the "Interest-Only Period") in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 240 payments in an amount sufficient to fully amortize the outstanding principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments.

I will make my monthly payments on the first day of each month beginning on July 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at 1165 West Alameda Drive, Tempe, AZ 85282 or at a different place if required by the Note Holder.

**(B) Amount of My Initial Monthly Payments**

Each of my initial monthly payments will be in the amount of U.S. \$3,226.57. This payment amount is based on the original principal balance of the Note. This payment amount may change.

**4. INTEREST RATE AND MONTHLY PAYMENT CHANGES****(C) Calculation of Changes**

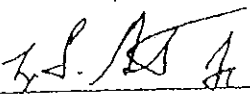
Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage point(s) (2.750%) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment amount will not be reduced due to voluntary prepayments.

**7. BORROWER'S FAILURE TO PAY AS REQUIRED****(A) A Late Charge for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000% of my overdue payment of interest during the interest-only period, 4.000% of my overdue payment of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

Dated: 5/5/06

  
Rex T. Gilbert, JR.

EXHIBIT

INT Only Addendums / ARMS (603E)  
01/27/2004

1/2003



FILED IN MESA COUNTY, NE  
IN MAY 10 2006 AT 02:39:17 PM  
BY LRS CLERK JLT  
CLERK OF COURT  
BOOK 219 PAGE 53

## DEED OF TRUST

MAY 11 2006  
Return To: First National Bank of Arizona  
P.O. Box 66604, Phoenix, AZ 85082  
Prepared By: Ngoc Chu  
and Casey, Grimsley & Ragaller, PLLC

MIN 100135553000008437

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated May 5, 2006

together with all Riders to this document.

(B) "Borrower" is Rex T. Gilbert, JR and Daniela L. Gilbert, Husband and Wife

Borrower is the trustor under this Security Instrument.

(C) "Lender" is First National Bank of Arizona

Lender is a NATIONAL BANKING ASSOCIATION  
organized and existing under the laws of The United States of America  
0843

NORTH CAROLINA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS Form 3034 1/01

6A(INC) (0207).01

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Initials: RT

VMP MORTGAGE (DAMS - 18001571-7251)

EXHIBIT

3



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Lender's address is 1760 Old Meadow Road, 2nd Floor, McLean, VA 22102

(D) "Trustee" is MATTHEW J. RAGALLA

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2025, First MI 48301-2025, tel. (888) 679-MERS

(F) "Note" means the promissory note signed by Borrower and dated May 5, 2006

The Note states that Borrower owes Lender five hundred twenty-five thousand and 00/100 Dollars

(U.S. \$525,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than June 1, 2036

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower (check box as applicable):

<input checked="" type="checkbox"/> Adjustable Rate Rider	<input type="checkbox"/> Condominium Rider	<input type="checkbox"/> Second Home Rider
<input type="checkbox"/> Balloon Rider	<input type="checkbox"/> Planned Unit Development Rider	<input type="checkbox"/> 1-4 Family Rider
<input type="checkbox"/> VA Rider	<input type="checkbox"/> Biweekly Payment Rider	<input checked="" type="checkbox"/> Other(s) (specify)
Interest Only Rider		

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard

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WHD-5A(NC) (02/07/01)

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Form 3034 1/01



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to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(2) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

## TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee and Trustee's successors and assigns, in trust, with power of sale, the following described property located in the

COUNTY

of

Hyde

(Type of Recording Jurisdiction)

(Name of Recording Jurisdiction)

SEE ATTACHED LEGAL DESCRIPTION

Parcel ID Number: 207592

which currently has the address of

134 West End Road

(Street)

Ocracoke

(City), North Carolina 27960

(Zip Code)

("Property Address"):

TO HAVE AND TO HOLD this property unto Trustee and Trustee's successors and assigns, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

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THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering all real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows.

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender is payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. If Borrower has breached any covenant or agreement in this Security Instrument and Lender has accelerated the obligations of Borrower hereunder pursuant to Section 22 the Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. **Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and

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Initialed: *RTB*

*DLG*

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WMD-6A(NC) (0107).01



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assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to

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prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any

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interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is

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reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. **Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve, if permitted under Applicable Law, in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve, if permitted under Applicable Law. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, if permitted under Applicable Law, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement

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provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds: Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material

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impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 7.

12. **Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in interest of Borrower shall not operate to release the liability of Borrower or any Successors in interest of Borrower. Lender shall not be required to commence proceedings against any Successor in interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. **Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. **Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. **Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time.

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Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects

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Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. **Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

0843

6A(1)(C) (07/01/01)

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Initials: EB  
DK

Form 3034 1/01



BOOK 219 PAGE 85

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agreed as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 10 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, and if it is determined in a hearing held in accordance with Applicable Law that Trustee can proceed to sale, Trustee shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons as Applicable Law may require. After the time required by Applicable Law and after publication of the notice of sale, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, Trustee's fees of 5.000 % of the gross sale price; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it. The interest rate set forth in the Note shall apply whether before or after any judgment on the indebtedness evidenced by the Note.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender or Trustee shall cancel this Security Instrument. If Trustee is requested to release this Security Instrument, all notes evidencing debt secured by this Security Instrument shall be surrendered to Trustee. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Attorneys' Fees. Attorneys' fees must be reasonable.

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6A(NC) 102071.01

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initials: *RTR*

*OLG*

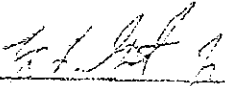
Form 3034 1/01



BOOK 219 PAGE 86

BY SIGNING UNDER SEAL BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

  
\_\_\_\_\_  
Rex T. Gilbert, JR. (Seal)  
-Borrower


\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

  
Daniela L. Gilbert (Seal)  
-Borrower

\_\_\_\_\_  
(Seal)  
-Borrower

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Form 3034 1/01



STATE OF NORTH CAROLINA,

LINDA RUSH

a Notary Public of the County of

certify that Ben M. Gilbert, JR & Daniela L. Gilbert

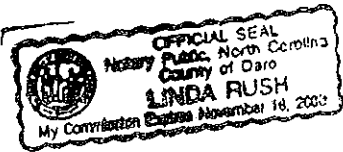
County ss:

State of North Carolina, do hereby

personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 5th day of May, 2006

My Commission Expires:



*Linda Rush*  
Notary Public

STATE OF NORTH CAROLINA,

The foregoing certificate of  
a Notary Public of the County of  
is certified to be correct.

This day of

County ss:

State of

Registrar of Deeds

By \_\_\_\_\_  
Deputy Assistant

0843

6A(1NC) 102071.01

Page 15 of 15

Initials: *DLC RTZ*

Form 3034 1/01

*[Handwritten signature]*



BACK 219 PAGE 66

### ADJUSTABLE RATE RIDER

(LIBOR Six-Month Index (As Published In The Wall Street Journal) - Rate Caps)

THIS ADJUSTABLE RATE RIDER is made this 3th day of May, 2008  
and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed  
of Trust, or Security Deed (the "Security Instrument") of the same date given by the  
undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to  
First National Bank of Arizona

("Lender") of the same date and covering the property described in the Security Instrument  
and located at: 134 West End Road, Ocracoke, NC 27960

[Property Address]

THE NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN THE  
INTEREST RATE AND THE MONTHLY PAYMENT. THE NOTE LIMITS THE  
AMOUNT BORROWER'S INTEREST RATE CAN CHANGE AT ANY ONE TIME  
AND THE MAXIMUM RATE BORROWER MUST PAY.

**ADDITIONAL COVENANTS.** In addition to the covenants and agreements made in the  
Security Instrument, Borrower and Lender further covenant and agree as follows:

#### A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for an initial interest rate of 7.375 %. The Note provides  
for changes in the interest rate and the monthly payments, as follows:

#### 4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

##### (A) Change Dates

The interest rate I will pay may change on the first day of June, 2013  
and on that day every 6th month thereafter. Each date on which my interest rate  
could change is called a "Change Date."

##### (B) The Index

Beginning with the first Change Date, my interest rate will be based on an Index. The  
"Index" is the average of interbank offered rates for six month U.S. dollar-denominated  
deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most  
recent Index figure available as of the first business day of the month immediately preceding  
the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based  
upon comparable information. The Note Holder will give me notice of this choice.

##### (C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding  
two and three-quarters percentage points  
( 2.750 %) to the Current Index. The Note Holder will then round the result of  
5300000843

MULTISTATE ADJUSTABLE RATE RIDER - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN  
THE WALL STREET JOURNAL) - Single Family - Fannie Mae Uniform Instrument

VMP-838A (0402) Form 3138 1/01

Page 1 of 3 Initials: NG RTB  
VMP Mortgage Solutions, Inc.  
(800)521-7291



BOOK 219 PAGE 65

In addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

**(D) Limits on Interest Rate Changes**

The interest rate I am required to pay at the first Change Date will not be greater than 13.375 % or less than 2.750 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one

percentage points

( 1.000 %) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 13.375 %.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes**

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

**B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER**

Uniform Covenant 18 of the Security Instrument is amended to read as follows:

**Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

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Initials: DLS RTZ

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If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

*Lex T. Gilbert JR* (Seal) *Don Wilbert* (Seal)  
-Borrower -Borrower

\_\_\_\_ (Seal) \_\_\_\_ (Seal)  
-Borrower -Borrower

\_\_\_\_ (Seal) \_\_\_\_ (Seal)  
-Borrower -Borrower

\_\_\_\_ (Seal) \_\_\_\_ (Seal)  
-Borrower -Borrower

0843

000-8387 (0402)

Page 3 of 3

Form 3138 1/01



BOOK 219 PAGE 71

INTEREST-ONLY ADDENDUM  
TO ADJUSTABLE RATE RIDER

LOAN NUMBER:                     

PROPERTY ADDRESS:

134 West End Road, Coconino, AZ 86040

THIS ADDENDUM is made this 5th day of May, 2006, and is incorporated into and intended to form a part of the Adjustable Rate Rider (the "Rider") dated the same date as this Addendum executed by the undersigned and payable to First National Bank of Arizona (the Lender).

THIS ADDENDUM supersedes Section 4 (C) of the Rider. None of the other provisions of the Note are changed by this Addendum.

4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage point(s) (2.750%) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

During first ten (10) years after the loan closing ("interest-only period"), the Note Holder will determine the amount of the monthly payment that would be sufficient to pay accrued interest on the unpaid principal balance. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the interest only period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the interest-only period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower unpaid principal balance.

At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal balance that I am expected to owe in substantially equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the interest-only period, my payment amount will not be adjusted due to voluntary principal payments.

Dated: 5/5/06

Rex T. Gilbert, JR  
Rex T. Gilbert, JR

Daniela L. Gilbert  
Daniela L. Gilbert



BOOK 219 PAGE 72

Exhibit "A"

All that certain lot or parcel of land lying and being in the Village of Ocracoke, in Ocracoke Township, Hyde County, North Carolina, and known and designated as and being Lot No. 34-A, in the subdivision known as Beachside Extension, as shown and delineated on a map or plan entitled "Recombination Plan of Lot 34-A & 35-A - Beachside Extension - Ocracoke, formerly lot 34 & 35 - Beachside Extension - Ocracoke" made by Seaboard Surveying & Planning, Inc. and recorded in Plat Cabinet C, Slice 325, Hyde County Registry.





1551 W. Alameda Drive  
Tempe, AZ 85282  
Office (480) 224-3521 Fax 480-224-3522

ALLONGE TO NOTE

LOAN NUMBER: [REDACTED] 0843  
BORROWER: Gilbert JR  
IN THE AMOUNT OF: \$525,000.00

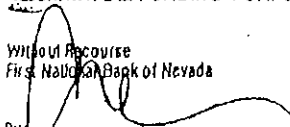
PAY TO THE ORDER OF:  
First National Bank of  
Nevada

WITHOUT RECOURSE BY:

  
AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

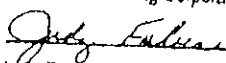
Pay to the order of  
**RESIDENTIAL FUNDING CORPORATION**

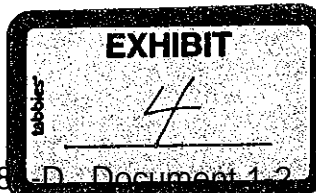
Without Recourse  
First National Bank of Nevada

By:   
Deutsche Bank National Trust  
Company, I/K/A Bankers Trust  
Company of California, N.A.  
as Custodian as Attorney In  
Fact

Christopher Corcoran  
Vice President

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation

BY   
Judy Faber, Vice President





LENDER OR LENDER'S AGENT

First National Bank of Arizona  
1760 Old Meadow Road  
Mc Lean, VA 22102

BORROWERS:

Pg 155 of 317

☐ Preliminary ☒ Final

DATE: 05/05/2006

LOAN NO.: 5300000843

Type of Loan: ARM

ADDRESS:

CITY/STATE/ZIP:

PROPERTY: 134 West End Road Ocracoke NC 27960

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
7.953 %	\$ 943,469.57	\$ 507,473.43	\$ 1,450,943.00

## PAYMENT SCHEDULE:

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING	NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING
84	\$3,226.57	07/01/2006			
36	\$3,500.00	07/01/2013			
239	\$4,391.32	07/01/2016			
1	\$4,385.64	06/01/2036			

DEMAND FEATURE: ☒ This loan does not have a Demand Feature. ☐ This loan has a Demand Feature as follows:

## VARIABLE RATE FEATURE:

☒ This Loan has a Variable Rate Feature. Variable Rate Disclosures have been provided to you earlier.

SECURITY: You are giving a security interest in the property located at:

134 West End Road Ocracoke NC 27960

ASSUMPTION: Someone buying this property ☐ cannot assume the remaining balance due under original mortgage terms☒ may assume, subject to lender's conditions, the remaining balance due under original mortgage terms.

FILING / RECORDING FEES: \$ 250.00

PROPERTY INSURANCE: You may obtain property insurance from anyone you want that is acceptable to Lender.

LATE CHARGES: If your payment is more than 15 days late, a late charge of 4.000 % of the payment will be assessed.

PREPAYMENT: If you pay off your loan early, you

☐ may ☒ will not have to pay a penalty.  
☐ may ☒ will not be entitled to a refund of part of the finance charge.

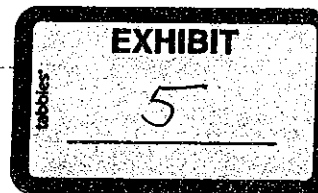
See your contract documents for any additional information regarding non-payment, default, required repayment in full before scheduled date, and prepayment refunds and penalties.  
 e means estimate

I/We hereby acknowledge reading and receiving a complete copy of this disclosure.

Rex T. Gilbert, JR

5/5/06  
BORROWER/DATE

Daniela L. Gilbert

5/5/06  
BORROWER/DATE

BORROWER/DATE

BORROWER/DATE

5300000843



ANNUAL PERCENTAGE RATE

This is not the Note rate for which the borrower applied. The Annual Percentage Rate (APR) is the cost of the loan in percentage terms taking into account various loan charges of which interest is only one such charge. Other charges which are used in calculation of the Annual Percentage Rate are Private Mortgage Insurance or FHA Mortgage Insurance Premium (when applicable) and Prepaid Finance Charges (loan discount, origination fees, prepaid interest and other credit costs). The APR is calculated by spreading these charges over the life of the loan which results in a rate generally higher than the interest rate shown on your Mortgage/Deed of Trust Note. If interest was the only Finance Charge, then the interest rate and the Annual Percentage Rate would be the same.

PREPAID FINANCE CHARGES

Prepaid Finance Charges are certain charges made in connection with the loan and which must be paid upon the close of the loan. These charges are defined by the Federal Reserve Board in Regulation Z and the charges must be paid by the borrower. Non-Inclusive examples of such charges are: Loan origination fee, "Points" or Discount, Private Mortgage Insurance or FHA Mortgage Insurance, Tax Service Fee. Some loan charges are specifically excluded from the Prepaid Finance Charge such as appraisal fees and credit report fees.

Prepaid Finance Charges are totaled and then subtracted from the Loan Amount (the face amount of the Deed of Trust/Mortgage Note). The net figure is the Amount Financed as explained below.

FINANCE CHARGE

The amount of interest, prepaid finance charge and certain insurance premiums (if any) which the borrower will be expected to pay over the life of the loan.

AMOUNT FINANCED

The Amount Financed is the loan amount applied for less the prepaid finance charges. Prepaid finance charges can be found on the Good Faith Estimate/Settlement Statement (HUD-1 or 1A). For example if the borrower's note is for \$100,000 and the Prepaid Finance Charges total \$5,000, the Amount Financed would be \$95,000. The Amount Financed is the figure on which the Annual Percentage Rate is based.

TOTAL OF PAYMENTS

This figure represents the total of all payments made toward principal, interest and mortgage insurance (if applicable).

PAYMENT SCHEDULE

The dollar figures in the Payment Schedule represent principal, interest, plus Private Mortgage Insurance (if applicable). These figures will not reflect taxes and insurance escrows or any temporary buydown payments contributed by the seller.



LENDER: First National Bank of Arizona

DATE 5/5/06  
LOAN NO. 0843  
TYPE Conventional

BORROWERS/OWNERS Rex T. Gilbert, JR

ADDRESS 134 West End Road  
CITY/STATE/ZIP Ocracoke, NC 27960  
PROPERTY 134 West End Road, Ocracoke, NC 27960

#### YOUR RIGHT TO CANCEL

You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

- (1) The date of the transaction, which is  
or
- (2) The date you received your Truth In Lending disclosures;  
or
- (3) The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

#### HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

First National Bank of Arizona  
MS AZ-4003-078  
1665 W. Alameda Drive  
Tempe, AZ 85282-3200

Or Fax to: (602) 636-7096

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of  
(or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

#### I WISH TO CANCEL

CONSUMER'S SIGNATURE

DATE

Each of the borrowers/owners in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective as to all borrowers/owners.

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL

X Rex T. Gilbert, JR 5/5/06 X  
BORROWER/OWNER Rex T. Gilbert, JR DATE BORROWER/OWNER DATE

X Daniela L. Gilbert 5/5/06 X  
BORROWER/OWNER Daniela L. Gilbert DATE BORROWER/OWNER DATE

#### CONFIRMATION CERTIFICATE

##### DO NOT SIGN UNTIL THREE BUSINESS DAYS HAVE ELAPSED

Three business days have elapsed since the undersigned have received two copies of this document. Each of the undersigned hereby certify and warrant that they have not exercised any right which they may have to rescind the transaction, that they do not desire to do so, and that they ratify and confirm the transaction in all respects.

BORROWER/OWNER Rex T. Gilbert, JR DATE BORROWER/OWNER DATE

BORROWER/OWNER Daniela L. Gilbert DATE BORROWER/OWNER DATE

0843

VMP -66 (0305).01

VMP Mortgage Solutions (800)521-7291

10/00

EXHIBIT



LENDER: First National Bank of Arizona

VARIABLE RATE LOAN PROGRAM:

*Six (6) Month LIBOR ARM Fixed for the First Seven (7) Years - First (10) Years Interest - Only Payments*

This variable rate loan program disclosure describes the features of the adjustable rate mortgage ("ARM") program you are considering. Information on other ARM programs is available upon request. This is neither a contract nor a commitment to lend. If you do obtain a loan from the Lender, the Note, Security Instrument and related documents will establish your legal rights and obligations.

Because the Lender may sell any loan it makes, the purchaser of the loan ("Noteholder") may enforce the terms of any loan obtained from the Lender. You will be required to make payments to the Noteholder or a servicer the Noteholder designates. For purpose of easy reference the term Lender is used below and refers to the initial Lender or purchaser of the note.

**HOW YOUR INTEREST RATE AND PAYMENT ARE DETERMINED**

- Your interest rate will be based on an index rate plus a margin.
- During the period that you make your payments of interest only, your payments will be based on the interest rate and loan balance. After that period, your payment will be based on the interest rate, loan balance and remaining loan term.
- The index upon which the Interest Rate will be based is the yearly average of interbank offered rate for six-month U.S. Dollar denominated deposits in the London Market ("LIBOR").
- Information about the current index is published in the Wall Street Journal
- This ARM loan may have a discount feature, and your initial interest rate may not be based on the index used to make later adjustments. Ask about our current discount rate.
- Your interest rate will equal the index rate plus your margin unless your interest rate "caps" limit the amount of change in the interest rate.
- During the first ten (10) years, interest only payments will be required to be made. This means that the regular monthly payments will not reduce the principal balance during the first ten (10) years of your loan.
- Beginning in year eleven (11), the payment will be amortized over the remaining term and applied towards principal and interest.

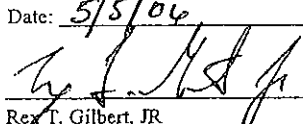
**HOW YOUR INTEREST RATE CAN CHANGE**

- Your interest rate can change every six (6) months beginning approximately 7 years after your loan closes. These are known as the "Change Dates".
- Your new interest rate will be equal to the sum of the margin and index value published on the first business day of the month in the month prior to the Change Date subject to the restrictions described below.
- Your interest rate cannot increase or decrease more than six percentage points (6.000%) at the first adjustment (a "cap").
- Your interest rate cannot increase or decrease more than one percentage point (1.000%) at each adjustment thereafter (a "cap").
- Your interest rate can never be less than your margin (a "cap").
- Your interest rate can never increase by more than six percentage points (6.000%) above the start rate (a "cap").
- Your interest rate will be rounded to the nearest .0125% at each adjustment.

**HOW YOUR MONTHLY PAYMENT CAN CHANGE**

- Your monthly payment can increase or decrease substantially every 6 months beginning approximately 7 years after your loan closes based on changes to the interest rate. You will begin making your new monthly payments on the first payment due date after each Change Date.
- At each Change Date during the interest-only period the lender will recalculate your monthly payment to be an amount necessary to fully repay the accrued interest at the then current interest rate.
- If you make a voluntary pre-payment of principal during the interest-only period, your payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current rate on the lower unpaid principal balance.
- At each Change Date after the interest-only period, the lender will recalculate your monthly payment based on an amount necessary to fully repay the unpaid principal balance at the then current interest rate on the maturity date in substantially equal monthly payments.
- You will be notified in writing at least 25 calendar days before the monthly adjustment is made. This notice will contain information about your index, interest rate, payment amount and loan balance.
- For example, on a new \$10,000, 30 year loan with an initial interest rate of 7.250% in effect in December 2005, the maximum amount that the interest rate could rise under this example is 6.000% over the start rate to 13.250%, and the payment amount could rise from a beginning payment of \$60.42 to a maximum of \$110.42\* in 7 years. (For example, the monthly payment for a mortgage amount of \$60,000/\$10,000 = 6; 6 x \$60.42 = \$362.52.)\* *The maximum payment amount reflects principal and interest. You will begin making monthly payments of principal and interest in the 11th year.* To compute the above example we used a margin value and interest rate we have used recently. Your margin value and interest rate may be different and you should ask about what is the current margin value and interest rate.

I/We hereby acknowledge receipt of this variable rate program disclosure and a copy of the Consumer Handbook on Adjustable Rate Mortgages on the date indicated below.

Date: 5/5/06  
  
 Rex T. Gilbert, JR.

**EXHIBIT**



OMB No. 2502-0265



## 3. Type of Loan

1. ☐ FHA 2. ☐ FinHA 3. ☒ Conv. Unins. 4. ☐ Fee Number 5. ☐ Loan Number 6. ☐ Mortgage Insurance Case Number  
4. ☐ VA 5. ☐ Conv. Ins. 6. ☐ 0843

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME AND ADDRESS OF BORROWER: Rex T. Gilbert, JR

134 West End Road  
Ocracoke, NC 27960

E. NAME AND ADDRESS OF SELLER:

F. NAME AND ADDRESS OF LENDER: First National Bank of Arizona  
1760 Old Meadow Road  
Mc Lean, VA 22102

G. PROPERTY 134 West End Road  
LOCATION: Ocracoke NC 27960

H. SETTLEMENT AGENT:

PLACE OF SETTLEMENT: 7531 SOUTH VIRGINIA DARE TRAIL  
NAGS HEAD, NC 27959

I. SETTLEMENT DATE: 05/05/2006

J. SUMMARY OF BORROWER'S TRANSACTION		K. SUMMARY OF SELLER'S TRANSACTION	
400. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract sales price		401. Contract sales price	
102. Personal property		402. Personal property	
103. Settlement charges to borrower: (from line 1400)	22581.02	403.	
104.		404.	
105.		405.	
ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:		ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:	
106. City/town taxes to		406. City/town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER:	22,581.02	420. GROSS AMOUNT DUE TO SELLER:	
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money		501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	525000.00	502. Settlement charges to seller (line 1400)	
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:		ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:	
210. City/town taxes to		510. City/town taxes to	
211. County taxes to		511. County taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER:	525,000.00	520. TOTAL REDUCTIONS IN AMOUNT DUE SELLER:	
300. CASH AT SETTLEMENT FROM/TO BORROWER:		600. CASH AT SETTLEMENT TO/FROM SELLER:	
301. Gross amount due from borrower (line 120)	22,581.02	601. Gross amount due to seller (line 420)	
302. Less amount paid by/for borrower (line 220)	525,000.00	602. Less total reductions in amount due seller (line 520)	
303. CASH <input type="checkbox"/> FROM <input checked="" type="checkbox"/> TO BORROWER:	502,418.98	603. CASH <input type="checkbox"/> TO <input type="checkbox"/> FROM SELLER:	

HUD-1 (3-86)  
RESPA, HB 4306.2

PAGE 1

EXHIBIT

8



DIVISION OF COMMISSION (LINE 700) AS FOLLOWS:		PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM LENDER'S FUNDS AT SETTLEMENT
701. 10.00	10		
702. 0.00	10		
703. Commission paid at settlement			
704.			
<b>300. ITEMS PAYABLE IN CONNECTION WITH LOAN:</b>			
801. Loan origination fee 1.000	% FIRST FLIGHT MTG.	5250.00	
802. Loan discount 0.000	%		
803. Appraisal fee to: FIRST FLIGHT MTG.		400.00 (poc)	
804. Credit report to: FIRST FLIGHT MTG.		35.00 (poc)	
805. Lender's Inspection (or FNBA)		35.00	
806. Mortgage Insurance application fee to			
807. Assumption fee			
808. Broker's Discount Fee			
809. Application Fee	COMMITMENT FEE TO FIRST	300.00	
810. Buydown Subsidy			
811. Yield Spread Premium	\$3,281.25 (poc)		
812. Underwriting/Commitment Fee	FNBA	699.00	
813. Document Preparation Fee			
814. Administration Fee	FNBA	13.25	
815. Flood Certification Fee	FNBA		
<b>900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:</b>			
901. Interest from 05/10/2006 to 06/01/2006 @ 6.106.08 /day.		2333.76	
902. Mortgage insurance premium for 0 mos. to			
903. Hazard insurance premium for 0 yrs. to		2031.00	
904. Flood insurance premium for 0 yrs. to		406.00	
905. Insurance Premium (Other)			
<b>1000. RESERVES DEPOSITED WITH LENDER:</b>			
1001. Hazard Insurance 7 months @ \$ 169.25	per month	1104.75	
1002. Mortgage Insurance 0 months @ \$	per month		
1003. City property taxes 0 months @ \$	per month		
1004. County property taxes 11 months @ \$ 232.99	per month	2562.89	
1005. Annual assessments 0 months @ \$	per month		
1006. Flood Insurance 0 months @ \$	per month		
1007. Insurance Reserves Other 0 months @ \$	per month		
1008. Tax Reserves (Other)			
<b>1100. TITLE CHARGES:</b>			
1101. Settlement or closing fee to TITLE		695.00	
1102. Abstract or title search to			
1103. Title examination to			
1104. Title Insurance binder to			
1105. Document preparation to			
1106. Notary fees to			
1107. Attorneys' fees to TITLE		695.00	
1108. Title Insurance to TITLE		577.81	
1109. Lender's coverage \$ 0.00			
1110. Owner's coverage \$ 0.00			
1111. Environmental Endorsement	TITLE	300.00	
1112. Reconveyance Fees			
1113.			
<b>1200. GOVERNMENT RECORDING AND TRANSFER CHARGES:</b>			
1201. Recording fees: Deed \$ 0.00 ; Mortgage \$ 0.00 ; Release \$ 0.00		250.00	
1202. City/County tax / stamps: Deed \$ 0.00 ; Mortgage \$ 0.00		750.00	
1203. State tax / stamps Deed \$ 0.00 ; Mortgage \$ 0.00		1500.00	
1204. Open R.E. 2005 TAX DUES		3414.75	
1205. Open			
<b>1300. ADDITIONAL SETTLEMENT CHARGES:</b>			
1301. Survey to			
1302. Pest Inspection to			
1303. Courier/Wire Transfer Fee	TITLE	200.00	
1304. Escrow Holdback Fee			
1305. Trustee Review Fee			
1306. County Property Tax			
1307. City Property Tax			
1308. Tax (Other)			
		22,581.02	
<b>1400. TOTAL SETTLEMENT CHARGES (Enter on line 103, Section J and line 502, Section K)</b>			
I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.			
Borrower: <u>Rak T. Gilbert, JR</u>	Date: <u>5/5/06</u>	Seller: _____	Date: _____
Borrower: _____	Date: _____	Seller: _____	Date: _____
The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.			
Date: _____		Settlement Agent: _____	
WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.			
VMP Mortgage Solutions, Inc. (800) 821-7221			



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1760 Old Meadow Road  
Mc Lean, VA 22102

Settlement Agent:

Place of Settlement:  
7531 SOUTH VIRGINIA DARE TRAIL  
NAGS HEAD, NC 27959

Settlement Date:  
05/05/2006

P.O.C.

Borrower	Seller
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100	100

X by J. H. H. Jr  
Rex T. Gilbert, JR

Rex T. Gilbert, JR

X\_\_\_\_\_

X\_\_\_\_\_

X \_\_\_\_\_

X \_\_\_\_\_

X \_\_\_\_\_

X

X \_\_\_\_\_



## ADDENDUM TO HUD-1 SETTLEMENT STATEMENT

Lender: First National Bank of Arizona

Loan Number: [REDACTED] 00843

Title Company:

Escrow Number:

Borrower(s): Rex T. Gilbert, JR

Property Address: 134 West End Road, Ocracoke, NC 27960

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

BUYER(S)

Rex T. Gilbert, JR 5/5/06  
Date

Date

Date

Date

SELLER(S)

\_\_\_\_\_  
Date

Date

\_\_\_\_\_  
Date

Date

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

L. Rush for M. Casey 5/5/06  
Settlement Agent Date

[The certifications contained herein may be obtained from the respective parties at different times or may be obtained on separate addenda].

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For Details, see: Title 18 U.S.C. Sections 1001 and 1010.

Form 205

Addendum to HUD-1 (Conv.) - ALL (205)  
6/18/2003



FIRST PAYMENT LETTER

Mortgagor(s): Rex T. Gilbert, JR

Property Address: 134 West End Road, Ocracoke, NC 27960

Loan Number: [REDACTED] 0843

Loan Amount: \$ 525,000.00  
Rate: 7.375%  
Term: 360 Month

Your payments are scheduled to begin on July 1, 2006 and are to be as follows:

First Payment	\$ 3,226.57
City Taxes	\$ 0.00
County Taxes	\$ 232.99
Hazard Insurance	\$ 169.25
Flood Insurance	\$ 0.00
FHA/PMI Insurance	\$ 0.00
Other Taxes	\$ 0.00
Other Insurance	\$ 0.00
<b>TOTAL PAYMENT</b>	<b>\$ 3,628.81</b>

In the event you do not receive information from your Servicing Department prior to your first payment, please forward your payments to the address below, including your loan number on your check. Your check should be made payable to: First National Bank of Arizona

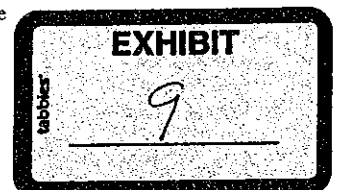
First National Bank of Arizona  
P.O. Box 62768  
Phoenix, AZ 85082-2768

In the event that your mortgage is sold to another mortgage company, please disregard this information and follow any new payment procedures or instructions.

Please sign and date the bottom of this form indicating your receipt of same. Thank you.

Rex T. Gilbert, JR 5/5/06 \_\_\_\_\_  
Rex T. Gilbert, JR Date Date

\_\_\_\_\_  
Date Date



First Payment Letter - ALL (1018)  
11/11/2004







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## Insurance Disbursement

Expense Advances

Male Charges Assessed on the 01/01/08

02/01/08, 03/01/08 payments

Payments made under repayment plan



STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

REX T. GILBERT, JR. AND	)
DANIELA L. GILBERT,	)
Plaintiffs,	)
v.	)
	)
DEUTSCHE BANK TRUST COMPANY	)
AMERICAS, As Trustee for	)
RESIDENTIAL ACCREDIT LOANS, INC.	)
DAVID A. SIMPSON, PC., Substitute	)
Trustee, RESIDENTIAL FUNDING, LLC,	)
And GMAC MORTGAGE, LLC,	)
Defendants,	)

---

PRELIMINARY INJUNCTION

This case was heard before the Court on the 1<sup>st</sup> day of October, 2009, upon the application of the plaintiffs for a preliminary injunction, and after notice and hearing and considering the verified complaint, the affidavits filed, and the evidence presented, the court finds the following facts:

1. Plaintiffs have set forth through their Complaint, Affidavit and the evidence presented claims for violations of the Federal Truth in Lending Act, usury and unfair acts and/or practices under G.S. 75-1.1, et seq.
2. The Court finds that the Plaintiffs did not carry their burden with respect to any of the claims that the Holder of the Note



was not the foreclosing party. This issue has been determined in the Special Proceeding.

3. The Court finds that the Plaintiffs have met their burden for purposes of the preliminary injunction hearing on the TILA claims. The Court finds that the Plaintiffs have tendered sufficient evidence to establish that they are likely to succeed on the merits of these claims.
4. Plaintiffs will suffer immediate and irreparable loss, injury and damage by virtue of losing title to their home unless an injunction is issued against the pending foreclosure sale noticed for October 27, 2009.
5. The injunction ordered imposes no undue burden or risk of harm to defendants.
6. Balancing the risk of harm between the parties favors injunctive relief in favor of Plaintiffs.

The Court concludes as a matter of law:

1. That the foreclosure sale of Plaintiffs' real property should be enjoined pending the resolution of this matter.

IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary injunction be and hereby is GRANTED; and

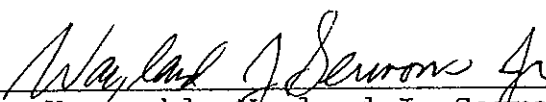
It is further ordered that the foreclosure sale of Plaintiffs' real property located at 134 West End Road, Ocracoke, North Carolina 27960, scheduled for Tuesday, October 27, 2009 at 10:00 AM be and hereby is STAYED; and defendants are hereby ENJOINED



from re-advertising and re-noticing said sale, foreclosing upon or otherwise transferring title to the property located at 134 West End Road, Ocracoke, North Carolina 27960, pending resolution of this matter,

IT IS FURTHER ORDERED that plaintiffs shall post bond in the amount of TEN THOUSAND (\$10,000.00) DOLLARS by 5 PM Friday, October 2, 2009, to indemnify and save harmless the Defendants pursuant to G.S. § 45-21.34. This bond shall be separate and apart from the three thousand dollars (\$3,000.00) that was previously posted. If this bond is not posted in accordance with this Order the Injunction shall dissolve and be of no further force and effect.

This the 9<sup>th</sup> day of October, 2009.

  
\_\_\_\_\_  
The Honorable Wayland J. Semons, Jr.  
Resident Superior Court Judge Presiding



**Exhibit C**



NO. COA10-361

NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

IN THE MATTER OF THE FORECLOSURE BY  
DAVID A. SIMPSON, P.C., SUBSTITUTE  
TRUSTEE, OF A DEED OF TRUST EXECUTED  
BY REX T. GILBERT, JR. AND DANIELA L.  
GILBERT, HUSBAND AND WIFE, DATED MAY  
5, 2006 AND RECORDED ON MAY 10, 2006,  
IN BOOK 219 AT PAGE 53 OF THE HYDE  
COUNTY PUBLIC REGISTRY

Hyde County  
No. 09 SP 09

Appeal by Respondents from order entered 18 August 2009 by Judge  
Marvin K. Blount, III in Hyde County Superior Court. Heard in the  
Court of Appeals 12 October 2010.

*Katherine S. Parker-Lowe, for respondent-appellants.*

*The Law Office of John T. Benjamin, Jr., P.A., by John T.  
Benjamin, Jr. and James R. White for petitioner-appellee.*

HUNTER, JR., Robert N., Judge.

Respondents Rex T. Gilbert, Jr. and his wife Daniela L. Gilbert,  
appeal from the trial court's Order authorizing David A. Simpson,  
P.C., as Substitute Trustee, to proceed with foreclosure under a  
power of sale in the Deed of Trust recorded in Book 219 at Page 53  
in the Hyde County Register of Deeds. We reverse.



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### **I. Factual and Procedural History**

On 5 May 2006, Respondent Rex T. Gilbert, Jr. executed an adjustable rate note ("the Note") to refinance an existing mortgage on his home. According to the terms of the Note, Mr. Gilbert promised to pay a principal amount of \$525,000.00 plus interest to First National Bank of Arizona. The Note was secured by a Deed of Trust, executed by Mr. Gilbert and his wife, Daniela L. Gilbert, on real property located at 134 West End Road, Ocracoke, North Carolina. The Deed of Trust identified First National Bank of Arizona as the lender and Matthew J. Ragaller of Casey, Grimsley & Ragaller, PLLC as the trustee.

The record reveals that, during 2008, Respondents ceased making payments on the Note and made an unsuccessful attempt to negotiate a modification of the loan. On 9 March 2009, a Substitution of Trustee was recorded in the Hyde County Register of Deeds, which purports to remove Matthew Ragaller as the trustee of the Deed of Trust and appoint his successor, David A. Simpson, P.C. ("Substitute Trustee"). The Substitution of Trustee identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 ("Petitioner") as the holder of the Note and the lien created by the Deed of Trust.

On 12 March 2009, the Substitute Trustee commenced this action by filing a Notice of Hearing on Foreclosure of Deed of Trust with



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the Hyde County Clerk of Superior Court pursuant to section 45-21.16 of our General Statutes. N.C. Gen. Stat. § 45-21.16 (2009). The Notice of Hearing stated, "the current holder of the foregoing Deed of Trust, and of the debt secured thereby, is: Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6."

In a letter dated 5 April 2009, Mr. Gilbert purported to exercise his right to rescind the loan transaction he entered into with the original lender, First National Bank of Arizona, pursuant to the federal Truth in Lending Act, 15 U.S.C. § 1635. As justification for his purported rescission, Gilbert alleged that the Truth in Lending Disclosure Statement provided by First National Bank of Arizona failed to accurately provide all required material disclosures including, *inter alia*, the correct annual percentage rate and payment schedule. The Substitute Trustee responded with a letter from GMAC ResCap, in which it denied any material disclosure errors were made and refused to rescind the loan transaction.

The foreclosure hearing was held on 2 June 2009 before the Clerk of Superior Court of Hyde County. The Honorable Sharon G. Sadler entered an Order on 17 June 2009, permitting the Substitute Trustee to proceed with the foreclosure. In the Order, the Clerk specifically found, *inter alia*, that Petitioner was the holder of the Note and Deed of Trust that it sought to foreclose and the Note



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evidenced a valid debt owed by Mr. Gilbert. Respondents appealed the Order to superior court.

The matter came on for a *de novo* hearing on 18 August 2009 before the Honorable Marvin K. Blount, III, in Hyde County Superior Court. During the hearing, the trial court admitted into evidence a certified copy of the Note and the Deed of Trust and two affidavits attesting to the validity of Gilbert's indebtedness pursuant to the Note, and that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note. Additionally, Petitioner introduced the original Note and Allonge for the trial court's inspection.

Reviewing the record before this Court, the Allonge contains a series of indorsements evidencing the alleged assignments of the Note, as follows:

PAY TO THE ORDER OF:  
First National Bank of Nevada  
WITHOUT RECOURSE BY:  
          [Signature]            
AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

Pay to the order of:  
RESIDENTIAL FUNDING CORPORATION  
Without Recourse  
FIRST NATIONAL BANK OF NEVADA  
By:           [Signature]            
Deutsche Bank National Trust  
Company, F/K/A Bankers Trust  
Company of California, N.A.  
as Custodian as Attorney in Fact



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[Illegible Name and Title]

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation  
BY [Signature]  
Judy Faber, Vice President

Respondents made two arguments at the hearing. First, Respondents argued that the debt evidenced by the Note no longer existed, as Mr. Gilbert had rescinded the transaction for the loan with First National Bank of Arizona. Petitioner objected to Respondents' rescission argument as being a defense in equity and, as such, inadmissible in a proceeding held pursuant to N.C. Gen. Stat. § 45-21.16. The trial court agreed and refused to let Respondents' expert witness testify as to alleged material errors in the Truth in Lending Disclosure Statement, which Mr. Gilbert alleged permitted him the right to rescind the loan. Second, Respondents argued that Petitioner had not produced sufficient evidence to establish that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 was the holder of the Note.

Based on the preceding evidence, the trial court entered an order on 18 August 2009 in which it found, *inter alia*: Mr. Gilbert executed the Note and, with his wife, executed a Deed of Trust in favor of First National Bank of Arizona, secured by the real property described in the Deed of Trust; a valid debt exists and is owed by



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Gilbert to Petitioner; Gilbert is in default under the Note and Deed of Trust; proper notice of the foreclosure hearing was given to all parties as required by N.C. Gen. Stat. § 45-21.16; Petitioner was the current holder of the Note and the Deed of Trust. The trial court concluded as a matter of law that the requirements of N.C. Gen. Stat. § 45-21.16 had been satisfied. Based on these findings and conclusion of law, the trial court authorized the Substitute Trustee to proceed with the foreclosure. Respondents timely entered notice of appeal.

## **II. Analysis**

A party seeking permission from the clerk of court to proceed with a foreclosure pursuant to a power of sale contained in a deed of trust must prove the following statutory requirements: (1) the party seeking foreclosure is the holder of a valid debt, (2) default on the debt by the debtor, (3) the deed of trust provides the right to foreclose, (4) proper notice was given to those parties entitled to notice pursuant to section 45-21.16(b). N.C. Gen. Stat. § 45-21.16(d) (2009). The General Assembly added a fifth requirement, which expired 31 October 2010: "that the underlying mortgage debt is not a subprime loan," or, if it is a subprime loan, "that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed[.]" *Id.* The role of the clerk of court



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is limited to making a determination on the matters specified by section 45-21.16(d). See *Mosler ex rel. Simon v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009). If the clerk's order is appealed to superior court, that court's *de novo* hearing is limited to making a determination on the same issues as the clerk of court. See *id.*

The trial court's order authorizing the foreclosure to proceed was a final judgment of the superior court, therefore, this Court has jurisdiction to hear the instant appeal. N.C. Gen. Stat. § 7A-27(b) (2009). Our standard of review for this appeal, where the trial court sat without a jury, is "whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Adams*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 693 S.E.2d 705, 708 (2010) (quoting *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000)).

We note the trial court classified multiple conclusions of law as "findings of fact." We have previously recognized "[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Generally, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law."



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*Id.* (citations omitted). Any determination made by “logical reasoning from the evidentiary facts,” however, “is more properly classified a finding of fact.” *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review. *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (citing *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675).

Looking to the trial court’s Order, we conclude that the following “findings of fact” are determinations that required the application of legal principles and are more appropriately classified as conclusions of law: a valid debt exists and is owed to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6; proper notice was given to and received by all parties as required by N.C. Gen. Stat. § 45-21.16 and the Rules of Civil Procedure; Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust. *See In re Watts*, 38 N.C. App. 90, 92, 247 S.E.2d 427, 428 (1978) (noting upon the appeal of a N.C. Gen. Stat. § 45-21.16 special proceeding the trial court’s *conclusions of law* included the existence of a valid debt, the right to foreclose under the deed of



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trust, and proper notice to the mortgagors); *see also Connolly v. Potts*, 63 N.C. App. 547, 549, 306 S.E.2d 123, 124 (1983) (same). In light of this reclassification of the trial court's findings of fact and conclusions of law, we turn to the issues raised on appeal.

### **1. Rescission of the Loan Transaction**

Respondents raise several arguments alleging the trial court erred by refusing to consider their defense to the foreclosure action, that the debt Petitioner sought to foreclose was not a valid debt—a required element under the statute for foreclosure by power of sale. *See* N.C. Gen. Stat. § 45-21.16(d)(i) (requiring, *inter alia*, that the clerk of court must determine that a valid debt exists). Respondents contend the debt is not valid because Mr. Gilbert rescinded the transaction by which he obtained the loan from First National Bank of Arizona pursuant to the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, and the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.1-.58. We conclude the trial court did not err.

The admissibility of evidence in the trial court is based upon that court's sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion. *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004). Here, we conclude the trial court properly refused to consider Respondents' evidence of rescission. Rescission under the TILA is



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an equitable remedy. See *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 819 (4th Cir. 2007) (“[A]lthough the right to rescind [under the TILA] is [statutory], it remains an equitable doctrine subject to equitable considerations.” (quoting *Brown v. Nat’l Permanent Fed. Sav. & Loan Ass’n*, 683 F.2d 444, 447 (D.C. Cir. 1982))). While legal defenses to a foreclosure under a power of sale are properly raised in a hearing held pursuant to section 45-21.16, equitable defenses are not. *Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429. As we have previously stated, a hearing under section 45-21.16 is “not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief.” *Id.* A party seeking to raise an equitable defense may do so in a separate civil action brought in superior court under section 45-21.34. *Id.*; N.C. Gen. Stat. § 45-21.34 (2009) (stating that a party with a legal or equitable interest in the subject property may apply to a superior court judge to enjoin a sale of the property upon legal or equitable grounds). Accordingly, the trial court properly concluded Respondents’ argument that Mr. Gilbert had rescinded the loan transaction, invalidating the debt Petitioner sought to foreclose, was an equitable defense and not properly before the trial court. Respondents’ argument is without merit.<sup>1</sup>

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<sup>1</sup> During the pendency of this action, the Gilberts filed a



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**2. Evidence that Petitioner was the Owner and Holder  
of Mr. Gilbert's Promissory Note**

Respondents also argue the trial court erred in ordering the foreclosure to proceed, as Petitioner did not prove that it was the holder of the Note with the right to foreclose under the instrument as required by section 45-21.16(d)(i) and (iii). We agree.

A "foreclosure under a power of sale is not favored in the law and its exercise will be watched with jealousy." *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (citations and internal quotation marks omitted). That the party seeking to foreclose on a promissory note is the holder of said note is an essential element of the action and the debtor is "entitled to demand strict proof of this element." *Liles v. Myers*, 38 N.C. App. 525, 528, 248 S.E.2d 385, 388 (1978).

For the trial court to find sufficient evidence that Petitioner is the holder of a valid debt in accordance with section 45-21.16(d), "this Court has determined that the following two questions must be

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separate action against Deutsche Bank Trust Company Americas, Residential Funding, LLC, GMAC Mortgage, LLC, and David A. Simpson, P.C. to litigate, *inter alia*, their TILA claim in Hyde County Superior Court. The defendants removed the action to federal court. See *Gilbert v. Deutsche Bank Trust Co. Americas*, slip op. at 1, 4:09-CV-181-D, 2010 WL 2696763 (E.D.N.C. July 7, 2010), *reconsideration denied*, 2010 WL 4320460 (E.D.N.C. Oct. 19, 2010). Because the Gilberts' claim was filed more than three years after the loan transaction was completed, the federal trial court dismissed the action for failure to state a claim upon which relief could be granted. *Id.* at \_\_\_, slip op. at 5.



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answered in the affirmative: (1) 'is there sufficient competent evidence of a valid debt?'; and (2) 'is there sufficient competent evidence that [the party seeking to foreclose is] the holder[ ] of the notes [that evidence that debt]?'" *Adams*, \_\_ N.C. App. at \_\_, 693 S.E.2d at 709 (quoting *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804-05 (1978)); see N.C. Gen. Stat. § 45-21.16(d) (2009) (in order for the foreclosure to proceed, the clerk of court must find, *inter alia*, the existence of a "valid debt of which *the party seeking to foreclose is the holder*," and a "right to foreclose under the instrument" securing the debt) (emphasis added).

Establishing that a party is the holder of the note is essential to protect the debtor from the threat of multiple judgments on the same note.

If such proof were not required, the plaintiff could negotiate the instrument to a third party who would become a holder in due course, bring a suit upon the note in her own name and obtain a judgment in her favor. . . . Requiring proof that the plaintiff is the holder of the note at the time of her suit reduces the possibility of such an inequitable occurrence.

*Liles*, 38 N.C. App. at 527, 248 S.E.2d at 387.

We have previously determined that the definition of "holder" under the Uniform Commercial Code ("UCC"), as adopted by North Carolina, controls the meaning of the term as it used in section 45-21.16 of our General Statutes for foreclosure actions under a



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power of sale. See *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125; *Adams*, \_\_\_ N.C. App. at \_\_\_, 693 S.E.2d at 709. Our General Statutes define the "holder" of an instrument as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." N.C. Gen. Stat. § 25-1-201(b) (21) (2009); *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980). Furthermore, a "[p]erson" means an individual, corporation, business trust, estate, trust . . . or any other legal or commercial entity." N.C. Gen. Stat. § 25-1-201(b) (27) (2009).

As addressed above, we conclude the trial court properly found that a valid debt existed. The remaining issue before this Court is whether there was competent evidence that Petitioner was the holder of the Note that evidences Mr. Gilbert's debt.

In support of its argument that it provided competent evidence to support the trial court's findings, Petitioner first points to its production of the original Note with the Allonge at the *de novo* hearing, as well as its introduction into evidence true and accurate copies of the Note and Allonge. Petitioner asserts this evidence "plainly evidences the transfers" of the Note to Petitioner. We cannot agree.

Under the UCC, as adopted by North Carolina, "[a]n instrument is transferred when it is delivered by a person other than its issuer



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for the purpose of giving to the person receiving delivery the right to enforce the instrument." N.C. Gen. Stat. § 25-3-203(a) (2009). Production of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument, as demonstrated in *Connolly*, 63 N.C. App. at 551, 306 S.E.2d at 125, and *Smathers v. Smathers*, 34 N.C. App. 724, 726, 239 S.E.2d 637, 638 (1977) (holding that despite evidence of voluntary transfer of promissory notes and the plaintiff's possession thereof, the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank. "[T]he plaintiff testified to some of the circumstances under which she obtained possession of the notes, but the trial court made no findings of fact with respect thereto.")

In *Connolly*, determining who had possession of the note became the critical question for the foreclosure proceeding. 63 N.C. App. at 551, 306 S.E.2d at 125. Several years prior to the foreclosure proceedings at issue in *Connolly*, the petitioners obtained a loan from a bank and pledged as collateral a promissory note that was payable to the petitioners by assigning and delivering the note to the bank. *Id.* at 549, 306 S.E.2d at 124. After obtaining their loan, the petitioners sought to foreclose on the promissory note and deed of trust, which was in the bank's possession, but were denied



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at the special proceeding before the clerk of court. *Id.* at 548, 306 S.E.2d at 124. The petitioners appealed the decision to superior court. *Id.* During the *de novo* hearing, the petitioners testified their loan to the bank had been paid, but "they had left the [] note at the bank, for security purposes." *Id.* at 551, 306 S.E.2d at 125. The petitioners, however, "introduced the originals of the note and deed of trust" during the hearing. *Id.* The trial court found the bank was in possession of the note and concluded, as a matter of law, the petitioners were not the holders of the note at the institution of the foreclosure proceedings; the foreclosure was again denied. *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 124-25. On appeal, this Court concluded that despite the fact that the party seeking foreclosure introduced the original note at the time of the *de novo* hearing, the trial court's findings of fact did not address whether the petitioners were in possession of the note at the time of the trial; the trial court's judgment was vacated and remanded. *Id.* at 551, 306 S.E.2d at 125-26.

Similarly, here, the trial court's findings of fact do not address who had possession of Mr. Gilbert's note at the time of the *de novo* hearing. Without a determination of who has physical possession of the Note, the trial court cannot determine, under the UCC, the entity that is the holder of the Note. See N.C. Gen. Stat. § 25-1-201(b)(21) (defining "holder" as "the person *in possession*



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of a negotiable instrument that is payable either to bearer or to an identified person that is the person *in possession*") (emphasis added); *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125 ("It is the fact of possession which is significant in determining whether a person is a holder, and the *absence of possession defeats that status.*") (emphasis added). Accordingly, the trial court's findings of fact do not support the conclusion of law that Petitioner is the holder of Mr. Gilbert's note.

Assuming *arguendo* that production of the Note was evidence of a transfer of the Note pursuant to the UCC and that Petitioner was in possession of the Note, this is not sufficient evidence that Petitioner is the "holder" of the Note. As discussed in detail below, the Note was not indorsed to Petitioner or to bearer, a prerequisite to confer upon Petitioner the status of holder under the UCC. See N.C. Gen. Stat. § 25-1-201(b)(21) (requiring that, to be a holder, a person must be in possession of the note payable to bearer or to the person in possession of the note). "[M]ere possession' of a note by a party to whom the note has neither been indorsed nor made payable 'does not suffice to prove ownership or holder status.'" *Adams*, \_\_\_ N.C. App. at \_\_\_, 693 S.E.2d at 710 (quoting *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 203, 271 S.E.2d at 57).



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Petitioner acknowledges that following the signing of the Note by Mr. Gilbert, the Note was sequentially assigned to several entities, as indicated by the series of indorsements on the Allonge, reprinted above. Respondents argue these indorsements present two problems. First, Respondents state that Petitioner did not provide any evidence to establish that Deutsche Bank National Trust Company had the authority, as the attorney-in-fact for First National Bank of Nevada, to assign the Note to Residential Funding Corporation in the second assignment. Respondents make no argument—and cite no authority to establish—that such evidence is needed. Therefore, we do not address the merits of this alleged error and deem it abandoned. See N.C. R. App. P. 28(6) (2011) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”)

Second, Respondents argue Petitioner has not offered sufficient evidence that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 was the holder of the Note and, thus, the party entitled to proceed with the foreclosure action. We agree.

Respondents note the third and final assignment on the Allonge was made to “Deutsche Bank Trust Company Americas as Trustee,” which is not the party asserting a security interest in Respondents’ property; this action was brought by Deutsche Bank Trust Company



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Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6, the entity the trial court found to be the owner and holder of the Note. Section 3-110 of the UCC, as codified in our General Statutes, states in pertinent part:

For the purpose of determining the *holder* of an instrument, the following rules apply:

. . . .

(2) If an instrument is payable to (i) a trust, an estate, *or a person described as trustee* or representative of a trust or estate, the instrument is *payable to the trustee*, the representative, or a successor of either, whether or not the beneficiary or estate is also named . . . .

N.C. Gen. Stat. § 25-3-110(c) (2009) (emphasis added). Additionally, the official comments to this section of the UCC state, in part, "This provision merely determines who can deal with an instrument as a holder. It does not determine ownership of the instrument or its proceeds." *Id.* § 25-3-110, Official Comment 3.

In the present case, the Note is clearly indorsed "PAY TO THE ORDER OF Deutsche Bank Trust Company Americas as Trustee." Thus, pursuant to section 25-3-110(c)(2), the Note is payable to Deutsche Bank Trust Company Americas as Trustee. *See Id.* Because the indorsement does not identify Petitioner and is not indorsed in blank or to bearer, it cannot be competent evidence that Petitioner is the holder of the Note. *See* N.C. Gen. Stat. § 25-1-201(b)(21) (defining



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"holder" as "[t]he person in possession of a negotiable instrument that is *payable either to bearer or to an identified person that is the person in possession*"; *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 204, 271 S.E.2d at 57 (concluding that where the defendants produced a copy of the note indorsed to an entity other than the plaintiff, the "defendants established that plaintiff was not the owner or holder of the note").

In addition to the Note and Allonge, Petitioner points to two affidavits provided by two GMAC Mortgage employees as further evidence that the trial court's findings are based on sufficient competent evidence. Again, we disagree.

The first affidavit is an Affidavit of Indebtedness by Jeffrey Stephan ("Stephan").<sup>2</sup> In his affidavit, Stephan averred, *inter*

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2 This Court finds troubling that GMAC Mortgage, LLC was recently found to have submitted a false affidavit by Signing Officer Jeffrey Stephan in a motion for summary judgment against a mortgagor in the United States District Court of Maine. Judge John H. Rich, III concluded that GMAC Mortgage submitted Stephan's false affidavit in bad faith and levied sanctions against GMAC Mortgage, stating:

[T]he attestation to the Stephan affidavit was not, in fact, true; that is, Stephan did not know personally that all of the facts stated in the affidavit were true. . . . GMAC [Mortgage] was on notice that the conduct at issue here was unacceptable to the courts, which rely on sworn affidavits as admissible evidence in connection with motions for summary judgment. In 2006, an identical jurat signed under identical circumstances resulted in the imposition of sanctions against GMAC [Mortgage] in Florida.



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*alia*, he was a limited signing officer for GMAC Mortgage, the sub-servicer of Mr. Gilbert's loan, and as such, was "familiar with the books and records of [GMAC Mortgage], specifically payments made pursuant to the Note and Deed of Trust." Accordingly, Stephan testified as to the principal amount of Mr. Gilbert's loan and to his history of loan payments. Stephan further testified that after the Note and Deed of Trust were executed they were "delivered" to the original lender, First National Bank of Arizona; the original lender then "assigned and transferred all of its right, title and interest" to First National Bank of Nevada, which, in turn, assigned all its rights, title, and interest in the instruments to Residential Funding Corporation. The final assignment to which Stephan averred is an assignment and securitization of the Note and Deed of Trust from Residential Funding Corporation to "Deutsche Bank Trust Company Americas as Trustee." Stephan then makes the conclusory statement, "Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust described herein."

Whether Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of the Note and Deed of Trust is a legal conclusion that is



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to be determined by a court of law on the basis of factual allegations. As such, we disregard Stephan's conclusion as to the identity of the "owner and holder" of the instruments. See *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) ("Statements in affidavits as to opinion, belief, or conclusions of law are of no effect." (quoting 3 Am. Jur. 2d, *Affidavits* § 13 (2002))); see also *Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, \_\_ N.C. App. \_\_, \_\_ n.2, \_\_ S.E.2d \_\_, \_\_ n.2, slip op. at 12 n.2, No. 09-1451 (Feb. 15, 2011) (rejecting a party's contention that this Court must accept as true all statements found in the affidavits in the record, stating, "our standard of review does not require that we accept a witness' characterization of what 'the facts' mean"). While Stephan referred to a Pooling and Servicing Agreement ("PSA") that allegedly governs the securitization of the Note to Deutsche Bank Trust Company Americas as Trustee, the PSA was not included in the record and will not be considered by this Court. See N.C. R. App. P. 9(a) (2011) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.") The record is void of any evidence the Note was assigned and securitized to a trust.

We also note that Stephan alleged no facts as to who possesses Mr. Gilbert's note, other than his averment that the Note was



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"delivered" to the original lender, First National Bank of Arizona. Stephan referred to a statement made by counsel for GMAC Mortgage that the original Note "would be brought to the foreclosure hearing," but he did not provide any facts from which the trial court could determine who has possession of the Note. As demonstrated by *Connolly*, discussed above, production of a note at trial is not conclusive evidence of possession. 63 N.C. App. at 551, 306 S.E.2d at 125. Thus, we conclude Stephan's affidavit is not competent evidence to support the trial court's conclusion that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of Mr. Gilbert's note.

Petitioner also provided the affidavit of Scott Zeitz ("Zeitz"), who alleged in his affidavit to be a litigation analyst for GMAC Mortgage. Zeitz's basis for his affidavit testimony is that he works with "the documents that relate to account histories and account balances of particular loans" and that he is familiar with Mr. Gilbert's account. Accordingly, Zeitz testified to the details of Mr. Gilbert's loan and the terms of the Note. Zeitz's affidavit, substantially similar to the affidavit of Jeffrey Stephan, also averred to the transfer of the Note and Deed of Trust through the series of entities indicated on the Allonge, stating in part:

Residential Funding Corporation sold, assigned  
and transferred all of its right, title and  
interest in and to the Note and Deed of Trust



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to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. *This is reflected on the Allonge to the Note, a true and accurate copy of which is attached* and incorporated hereto as EXHIBIT 5. (Emphasis added.)

This statement is factually incorrect; the Allonge in the record contains no indorsement to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. Zeitz further stated that "Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust." This statement is a legal conclusion postured as an allegation of fact and as such will not be considered by this Court. See *Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 349.

Unlike Jeffrey Stephan, Zeitz stated that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 "has possession of the original Note and Deed of Trust." We note, however, that "[w]hen an affiant makes a conclusion of fact, it must appear that the affiant had an opportunity to observe and did observe matters about which he or she testifies." *Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 348-49 (quoting 3 Am. Jur. 2d *Affidavits* § 13) (internal quotation marks omitted). Moreover,

[t]he personal knowledge of facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could



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have known such facts and if there is no evidence from which an inference of personal knowledge can be drawn, then it is presumed that such does not exist.

*Id.* at 622-23, 596 S.E.2d at 349 (quoting 3 Am. Jur. 2d *Affidavits* § 14, cited with approval in *Currituck Associates Residential P'ship v. Hollowell*, 170 N.C. App. 399, 403-04, 612 S.E.2d 386, 389 (2005)). Thus, while Zeitz concluded as fact that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 has possession of the Note, his affidavit provides no basis upon which we can conclude he had personal knowledge of this alleged fact. Because of these deficiencies, we conclude that neither the affidavit of Jeffrey Stephan nor the affidavit of Scott Zeitz is competent evidence to support the trial court's finding that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of Mr. Gilbert's note.

### **III. Conclusion**

We conclude the record is lacking of competent evidence sufficient to support that Petitioner is the owner and holder of Mr. Gilbert's note and deed of trust. The trial court erred in permitting the Substitute Trustee to proceed with foreclosure proceedings and its order is



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Reversed.

Judges MCGEE and BEASLEY concur.



**Exhibit D**



**PUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

REX T. GILBERT, JR.; DANIELA L.  
GILBERT,

*Plaintiffs-Appellants,*

v.

RESIDENTIAL FUNDING LLC; GMAC  
MORTGAGE LLC; DEUTSCHE BANK  
TRUST COMPANY AMERICAS, as  
Trustee for Residential Accredit  
Loans, Incorporated,

*Defendants-Appellees,*

and

DAVID A. SIMPSON, Substitute  
Trustee,

*Trustee.*

No. 10-2295

Appeal from the United States District Court  
for the Eastern District of North Carolina, at Raleigh.  
James C. Dever III, District Judge.  
(4:09-cv-00181-D)

Argued: January 24, 2012

Decided: May 3, 2012

Before TRAXLER, Chief Judge, FLOYD, Circuit Judge,  
and J. Michelle CHILDS, United States District Judge for  
the District of South Carolina, sitting by designation.

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Affirmed in part, reversed in part, and remanded by published opinion. Judge Floyd wrote the opinion, in which Chief Judge Traxler and Judge Childs joined.

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**COUNSEL**

**ARGUED:** Katherine Suzanne Parker-Lowe, Ocracoke, North Carolina, for Appellants. Marc James Ayers, BRADLEY ARANT BOULT CUMMINGS, LLP, Birmingham, Alabama, for Appellees. **ON BRIEF:** Nicholas J. Voelker, BRADLEY ARANT BOULT CUMMINGS, LLP, Charlotte, North Carolina, Jonathan M. Hooks, BRADLEY ARANT BOULT CUMMINGS, LLP, Birmingham, Alabama, for Appellees.

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**OPINION**

FLOYD, Circuit Judge:

Rex and Daniela Gilbert appeal the district court's dismissal of their claim that Deutsche Bank Trust Company Americas (Deutsche), as trustee for Residential Accredited Loans, Inc. (RAL); David A. Simpson (Simpson), substitute trustee; Residential Funding LLC (RFL); and GMAC Mortgage LLC (GMAC) violated various consumer protection laws in connection with a mortgage the Gilberts secured on their home, located at 134 West End Road, Ocracoke, North Carolina (the subject property). Specifically, the Gilberts allege that they are entitled to relief on account of violations of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667(f), and its implementing regulation, Regulation Z, 12 C.F.R. § 1026 (previously codified at 12 C.F.R. § 226); North Carolina usury law, N.C. Gen. Stat. § 24; the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA), *id.* § 75-1.1; and North Carolina's Prohibited Acts by Debt Col-



lectors statute, *id.* § 75-50. The Gilberts also claim a breach of contract and that Deutsche lacks the authority to enforce the loan.

Appellees filed a motion to dismiss, which the district court granted. The Gilberts timely appealed. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

I.

We review the district court's decision granting a motion to dismiss *de novo*, and we view the facts in the light most favorable to the non-prevailing party. *See Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999).

On May 5, 2006, Rex Gilbert executed an adjustable rate note with First National Arizona to refinance the existing lien on the subject property. Pursuant to the terms of the note, Mr. Gilbert agreed to pay a principal amount of \$525,000, plus interest to the bank. The Gilberts executed a deed of trust on the subject property to secure the note. As a part of the transaction, First National Arizona provided several disclosures, including a "Truth in Lending Disclosure Statement," a "Notice of Right to Cancel," a "Variable Rate Mortgage Program Disclosure," a "HUD-1 Settlement Statement," and a "First Payment Letter."

Thereafter, according to the district court, First National Arizona transferred its interest in the Gilberts' mortgage to First National Bank of Nevada, First National Bank of Nevada transferred its interest in the mortgage to RFL, and RFL sold its interest to Deutsche, as the trustee for RAL. *Gilbert v. Deutsche Bank Trust Co. Ams.*, No. 09-CV-181-D, 2010 WL 2696763, at \*1 (E.D.N.C. July 7, 2010). Thus, the district court stated, Deutsche, as the trustee for RAL, currently owns and holds the note and deed of trust on the subject



property. *Id.* RFC is the master servicer and GMAC is the subservicer. *Id.* at \*2.

The Gilberts defaulted on the loan in 2008. Subsequently, Deutsche chose Simpson as the substitute trustee of the deed of trust. *Id.* On March 12, 2009, Simpson filed a foreclosure action against the Gilberts in the Hyde County Superior Court.

The Gilberts' counsel wrote a letter to GMAC dated April 5, 2009, in which she alleged several violations of TILA, provided notice that the Gilberts were rescinding their mortgage transaction, and requested that GMAC cancel its security interest in the subject property and return all consideration paid by the Gilberts. In a letter dated April 14, 2009, counsel for GMAC responded that GMAC had reviewed the Gilberts' file and found "no basis to conclude that there were any material disclosure errors that would give rise to an extended right of rescission." As such, counsel for GMAC stated that they would not rescind the transaction.

On June 2, 2009, the Clerk of the Hyde County Superior Court conducted a foreclosure hearing, after which she entered a June 17, 2009, order allowing Simpson to proceed with the foreclosure. According to the order, the Clerk found that Deutsche was the holder of the subject note and deed of trust and that the note evidenced a valid debt. The Gilberts appealed to the Hyde County Superior Court.

Following a de novo hearing on the matter on August 18, 2009, the superior court allowed the foreclosure proceeding to go forward. In doing so, the court relied in part on an affidavit signed by Jeffrey Stephan, a signing officer for GMAC, certifying the validity of the indebtedness pursuant to the note as well as Deutsche's status as the current owner and holder of the note. The Gilberts appealed that decision to the North Carolina Court of Appeals.



On September 14, 2009, while their appeal was pending, the Gilberts filed suit in the Hyde County Superior Court against Appellees seeking, among other things, to enjoin the mortgage foreclosure sale and to rescind their May 5, 2006, loan. They alleged violations of TILA by Appellees. The Gilberts also claimed that Appellees violated North Carolina usury law, engaged in unfair and deceptive trade practices, engaged in prohibited debt collection acts, and breached the mortgage contract. The Gilberts further maintained that Deutsche was without authority to enforce the note because of a defect in the allonge, which granted Deutsche an interest in the note.

Appellees removed the Gilberts' suit to the district court and subsequently filed a motion to dismiss the complaint, which the district court granted. This appeal, in which the Gilberts contest the district court's dismissal of their TILA, usury, and NCUDTPA claims, followed. They also assign error to the district court's determination that res judicata barred them from raising claims related to the endorsement on the allonge to the note, as well as the district court's denial of their motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

After becoming aware that Stephan had engaged in improper affidavit practices in unrelated cases, the Gilberts filed with the district court a motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and Rule 12.1 of the Federal Rules of Appellate Procedure. In light of this new evidence, they requested that the district court file an order indicating whether it would be inclined to relieve them of its prior order dismissing their claims and its denial of their Rule 59(e) motion.

On May 3, 2011, the North Carolina Court of Appeals reversed the superior court's decision to allow Simpson to proceed with a foreclosure sale, finding that "the record is lacking of competent evidence sufficient to support that



[Deutsche] is the owner and holder of Mr. Gilbert's note and deed of trust." *In re Simpson*, 711 S.E.2d 165, 175 (N.C. Ct. App. 2011). The court was also troubled by the fact "that [GMAC] was recently found to have submitted a false affidavit by Signing Officer Jeffrey Stephan in a motion for summary judgment against a mortgagor in the United States District Court of Maine." *Id.* at 173 n.2. The Gilberts subsequently supplemented their Rule 60(b) motion with a copy of the *Simpson* opinion.

On June 15, 2011, the district court filed an order stating that "should the Fourth Circuit return jurisdiction to this court, the court would grant the [Rule 60(b)] motion, dismiss the federal claims for the reasons stated in the July 7, 2010[,] order [dismissing all of the Gilberts' claims], and remand all state-law claims to Hyde County Superior Court." *Gilbert v. Deutsche Bank Trust Co. Ams.*, No. 4:09-CV-181-D (E.D.N.C. June 15, 2011). In light of this order, the Gilberts filed a motion with us to reverse and remand the case to the district court. We denied the motion. Accordingly, we now undertake a de novo review of each of the Gilberts' assignments of error. *See Chaudhry*, 186 F.3d at 504.

## II.

### A.

The Gilberts first argue that the district court erred in dismissing their TILA claim on the basis that they had failed to exercise their extended right to rescind in a timely manner.

In adopting TILA, Congress declared that "[i]t is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). As such, TILA requires that a creditor make certain material disclosures at the time the loan is made. *Id.* § 1638(a). If the



creditor fails to comply with this mandate, the borrower has the right to rescind up to three years after the transaction. *Id.* § 1635(f).

The Gilberts closed the loan with First National Arizona on May 5, 2006, but they did not file the instant lawsuit until September 14, 2009. They notified GMAC by letter, however, that they were exercising their right to rescind in April 2009. So, although the Gilberts did not file this lawsuit within three years of closing the loan, they did notify GMAC that they were exercising their right to rescind during that three-year time period.

There is a split of authority as to whether the borrower must file a lawsuit within three years after the consummation of a loan transaction to exercise her right to rescind, or whether the borrower need only assert the right to rescind through a written notice within the three-year period. For example, in *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), the Ninth Circuit held that "rescission suits must be brought within three years from the consummation of the loan, regardless [of] whether notice of rescission is delivered within that three-year period." *Id.* at 1328. But, in *In re Hunter*, 400 B.R. 651 (Bankr. N.D. Ill. 2009), the bankruptcy court held that "TILA gives a consumer the right to rescind a credit transaction simply by notifying the creditor, within a specific period of time, that she intends to do so." *Id.* at 659.

The district court cited *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815 (4th Cir. 2007), for the proposition that the Gilberts were required to file suit to exercise their right of rescission. Thus, in that the Gilberts failed to file suit until after the three years passed, the district court dismissed their rescission claim. As explained below, however, we are convinced that the Gilberts exercised their right to rescind when they sent their April 5, 2009, letter to GMAC, alleging several violations of TILA and Regulation Z, and providing



notice of their rescission of the mortgage transaction. Moreover, we do not think that our prior decision in *Shelton* compels a contrary conclusion. Further, we disagree with the Ninth Circuit that a borrower must file a lawsuit within the three-year time period to exercise her right to rescind, as opposed simply to notifying the creditor.

We begin, as we must, with the plain meaning of the statute. "The starting point for any issue of statutory interpretation . . . is the language of the statute itself." *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

In the same way, our interpretation of regulations begins with their text. *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003). "The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." *Id.* In most cases, a textual reading will be dispositive. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Furthermore, "absent some obvious repugnance to the statute, the . . . regulation implementing [TILA] should be accepted by the courts." *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981).

Here, we are primarily concerned with just one statute and one regulation. Section 1635(f) provides, in relevant part, the following:

An obligor's right of rescission shall expire three years after the date of consummation of the transac-



tion or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor . . . .

15 U.S.C. § 1635(f). Its implementing regulation, Regulation Z, states as follows:

To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

12 C.F.R. § 1026.23(a)(2). Taking the plain meaning of these texts, and assuming that the words say what they mean and mean what they say, we come to the conclusion that the Gilberts exercised their right to rescind with the April 5, 2009, letter. Simply stated, neither 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.

But what about the *Shelton* case that the district court relied upon in reaching a different conclusion? There, the creditor filed an action seeking a declaratory judgment that the processing of the borrowers' home refinancing loan complied with TILA. 486 F.3d at 817. The borrowers counterclaimed, requesting damages for violations of TILA. *Id.* They also sought rescission and a declaration by the district court that the defendant had forfeited the loan principal pursuant to TILA. *Id.*

We stated that the "unilateral notification of cancellation does not automatically void the loan contract." *Id.* at 821. "[O]therwise, a borrower could get out from under a secured



loan simply by claiming TILA violations, whether or not the lender had actually committed any." *Id.* (quoting *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003)) (internal quotation marks omitted).

We must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided. The former is the concern of § 1635(f) and Regulation Z, and a borrower exercises her right of rescission by merely communicating in writing to her creditor her intention to rescind. To complete the rescission and void the contract, however, more is required. Either the creditor must "acknowledge[ ] that the right of rescission is available" and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind. *Shelton*, 486 F.3d at 821 (quoting *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54-55 (1st Cir. 2002)) (internal quotation marks omitted).

At this stage of the litigation, we are not concerned with whether the contract has been effectively voided. A court must make a determination on the merits as to whether that should occur. Instead, the question presented here is whether the Gilberts exercised their right to rescind with the April 5, 2009, letter. Based on the plain meaning of the applicable statute and regulation, we answer that question in the affirmative.

Appellees' reliance on *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), is misplaced. The *Beach* Court did not address the proper method of exercising a right to rescind or the timely exercise of that right. Instead, in *Beach*, the Court looked at "whether § 1635(f) is a statute of limitation, that is, 'whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim' or 'merely to bar the remedy for its enforcement.'" *Id.* at 416 (alteration in orig-



inal) (quoting *Midstate Horticultural Co. v. Pa. R.R. Co.*, 320 U.S. 356, 358-59 (1943)). The Court stated the following:

Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. . . . It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous.

*Id.* at 417. In other words, the three-year limitation in 15 U.S.C. § 1635 concerns the extinguishment of the right of rescission and does not require borrowers to file a claim for the invocation of that right. Thus, that the Gilberts failed to seek enforcement of their right to rescind within the three years does nothing to take away from the fact that they exercised their right of rescission within that time period.

B.

Next, the Gilberts argue that the district court's decision to dismiss their claim for rescission on the basis that Appellees are assignees and not creditors was improper. Appellees do not appear to disagree.

Section 1641(c) states, "Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation." 15 U.S.C. § 1641(c). The district court's holding to the contrary is reversible error.

C.

According to the Gilberts, the district court also erred in deciding that all of their money damages under TILA are barred by the one-year statute of limitations. We agree.



Section 1640(e) provides a one-year statute of limitations for the filing of a suit once a violation of TILA has occurred. *Id.* ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."). The alleged TILA disclosure violations occurred on May 5, 2006, but the Gilberts did not file suit until September 14, 2009. Thus, the statute of limitations for those violations has long past and the district court was correct in dismissing those claims.

But, it appears that the Gilberts' TILA claim regarding Appellees' refusal to honor their right to rescind was timely filed. The Gilberts sent a letter to GMAC pursuant to 15 U.S.C. § 1635(f) and Regulation Z on April 5, 2009, indicating that they were exercising their right to rescind the mortgage loan. The creditor then had twenty days to respond. *Id.* § 1635(b). The alleged violation of TILA occurred when GMAC sent the April 14, 2009, letter indicating that it would not rescind the loan transaction. To maintain an action for damages pursuant to TILA, the action had to be filed "within one year from the date of the occurrence of the violation." *Id.* § 1640(e). Inasmuch as the Gilberts filed this lawsuit on September 14, 2009, their TILA claim for damages for GMAC's refusal to honor their right to rescind is not time barred.

### III.

Next, the Gilberts challenge the district court's dismissal of their usury claim. Appellees make two arguments as to why the district court did not err. We are convinced by neither.

First, Appellees urge that the Gilberts' usury claim is not ripe for adjudication. According to Appellees, to the extent that the Gilberts might be subject to pay usurious interest, given the manner in which the payment schedule is configured, they have not yet been required to pay the alleged usurious interest rate. The Gilberts counter that because the



payments that they made were interest only, they were paying usurious interest with each payment. As such, according to the Gilberts, their claim is ripe. Construing the Gilberts' allegations as true, as we must at this stage, we accept that this claim is ripe for adjudication.

Second, Appellees maintain that the Gilberts failed to plead a usury claim. According to Appellees, parties have the right to pay any interest rate to which they agree. Therefore, claim Appellees, "to survive a motion to dismiss, the Gilberts would have to allege that they never agreed to the interest rates imposed by the loan documents. On this they are silent." We disagree.

In their complaint, the Gilberts allege that Appellees "charged and collected interest in excess of the agreed rate or limits set forth in Chapter 24 of the North Carolina General Statutes, including without limitation, the charge, collection and imposition of hidden finance charges contained in the erroneous payment schedule set forth in the Truth in [L]ending disclosure statement."

The elements of a usury claim are as follows:

a loan or forbearance of the collection of money,  
an understanding that the money owed will be paid,  
payment or an agreement to pay interest at a rate  
greater than allowed by law, and the lender's corrupt  
intent to receive more in interest than the legal rate  
permits for use of the money loaned.

*Swindell v. Fed. Nat'l Mortg. Ass'n*, 409 S.E.2d 892, 895 (N.C. 1991). "Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown." *Id.* at 895–96 (quoting *Kessing v. Nat'l Mortg.*



*Corp.*, 180 S.E.2d 823, 827 (1971)) (internal quotation marks omitted).

No one disputes that the Gilberts have established the first two elements. We hold that the Gilberts have adequately pled elements three and four as well. Specifically, the Gilberts contend that there was a loan that was to be repaid; pursuant to the terms of the loan, they were charged an agreed upon or stated interest rate; under the repayment schedule for the loan, they were charged a higher interest rate than agreed upon or allowed by Chapter 24 of the North Carolina General Statutes; when they paid a higher interest rate, Appellees collected more than the agreed upon or allowed interest rate; and Appellees charged the higher rate with a corrupt intent. Consequently, they have properly pled a usury claim pursuant to *Swindell*.

Although not argued by the parties or referenced below, on remand, the district court should consider whether North Carolina General Statute Section 24-1.1A(a)(1) ("Where the principal amount is ten thousand dollars (\$10,000) or more the parties may contract for the payment of interest as agreed upon by the parties . . ."), Section 24-9(a)(3) ("‘Exempt loan’ means a loan in which . . . [t]he loan amount is three hundred thousand (\$300,000) or more . . ."), and Section 24-9(b) ("A claim or defense of usury is prohibited in an exempt loan transaction.") are applicable.

#### IV.

The Gilberts also urge that the district court erred in granting Appellees’ Rule 12(b)(6) motion as to their NCUOTPA cause of action. To establish a *prima facie* case of unfair and deceptive trade practices, a plaintiff must demonstrate the following: (1) the defendant committed an unfair or deceptive trade practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Spartan Leasing v. Pollard*, 400 S.E.2d 476, 482



(N.C. Ct. App. 1991). An act is unfair when it is unethical or unscrupulous, and it is deceptive if it tends to deceive. *Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981).

In their allegations concerning their NCUDTPA claims, the Gilberts make the following complaints: usury law violations, TILA violations, and "falsely representing to be the owner and holder of [the Gilberts'] note and deed of trust." Thus, they argue the following:

These acts and omissions proximately damaged plaintiffs, are in and affecting commerce, violate public policy, have the capacity to deceive an ordinary consumer, are unscrupulous, immoral, and oppressive, and constitute unfair and/or deceptive trade practices under [North Carolina General Statute] § 75-1.1, thereby entitling plaintiffs to three times their actual damages plus a reasonable attorney's fee pursuant to [North Carolina General Statute] §§ 75-16 and 75-16.1.

Some of the Gilberts' allegations concern the actions of the Appellees, and some concern the actions of the original creditor, who is not party to this lawsuit. And, although some claims in this lawsuit can be assigned, "unfair practice claims pursuant to . . . § 75-1.1 cannot be assigned," *Investors Title Ins. Co. v. Herzig*, 413 S.E.2d 268, 271 (N.C. 1992). Thus, the district court properly dismissed those portions of the claims. "[A] violation of a consumer protection statute may, in some instances, constitute a *per se* violation of the UDTPA[.]" however. *In re Fifth Third Bank, Nat'l Ass'n-Vill. of Penland Litig.*, 719 S.E.2d 171, 176 (N.C. Ct. App. 2011). Inasmuch as we have held that certain of the Gilberts' TILA and usury claims should go forward, and because we are of the opinion that the Gilberts have set forth a sufficient factual basis for these claims, we hold that their unassigned NCUDTPA claims should be allowed to proceed as well.



V.

The Gilberts also contest the district court's determination that res judicata barred them from raising issues related to the endorsements on the allonge to the note.

As the district court recognized, "[i]ssues that 'the clerk of court decides at a foreclosure hearing as to the validity of the debt and the trustee's right to foreclose are subject to res judicata and cannot be relitigated.'" *Gilbert*, 2010 WL 2696763, at \*4 (quoting *Merrill Lynch Bus. Fin. Servs. Inc. v. Cobb*, No. 5:07-CV-129-D, 2008 WL 6155804, at \*3 (E.D.N.C. Mar. 18, 2008)). Because the superior court affirmed the Clerk's decision that Deutsche could enforce the note, the district court concluded that res judicata barred the Gilberts from relitigating Deutsche's enforcement authority. *Id.*

But, as noted above, on May 3, 2011, the North Carolina Court of Appeals reversed the state trial court's decision that allowed Simpson to proceed with a foreclosure sale, finding that "the record is lacking of competent evidence sufficient to support that [Deutsche] is the owner and holder of Mr. Gilbert's note and deed of trust." *In re Simpson*, 711 S.E.2d at 175. As such, res judicata no longer bars the Gilberts from litigating whether Deutsche has authority to enforce the note.

VI.

Finally, the Gilberts complain that the district court erred in denying their motion to alter or amend pursuant to Rule 59(e). Because we are reversing and remanding this case to the district court, the argument is moot.

VII.

In light of the foregoing, we affirm in part, reverse in part and remand for further proceedings.



GILBERT V. RESIDENTIAL FUNDING LLC

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*AFFIRMED IN PART,  
REVERSED IN PART,  
AND REMANDED*



**Exhibit E**



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**Exhibit F**



<b>KATHERINE S. PARKER-LOWE</b> <b>ATTORNEY AT LAW</b> <b>P.O. BOX 730</b> <b>OCRACOKE, NC 27960-0730</b>						
CLIENT:		Rex Tyler Gilbert, Jr. Post Office Box 504 Ocracoke, NC 27960-		Client No. 100725 Matter No. 2800056		
<b>DATE</b>	<b>CHARGE CODE &amp; SERVICES STATEMENT</b> <b>from 01/01/2008 to 05/13/2012</b>		<b>MINS</b>	<b>AMOUNT CHARGED</b>		
8/26/2008	CWC	Conference with Client	45	112.50		
8/27/2008	TCC	Telephone Call T/F Client	10	25.00		
9/12/2008	CWC	Conference with Client	15	37.50		
9/24/2008	CWC	Conference with Client	60	150.00		
10/2/2008	RAR	Received and Reviewed	6	15.00		
10/3/2008	EMA	Email	10	25.00		
10/7/2008	RES	Legal Research	120	300.00		
10/14/2008	FAX	EXPENSE-FAX	2	4.50		
10/14/2008	LTC	Local Telephone Call	25	62.50		
10/14/2008	LTC	Local Telephone Call	10	25.00		
10/14/2008	TCC	Telephone Call T/F Client	6	15.00		
10/20/2008	LTC	Local Telephone Call	120	300.00		
11/2/2008	LTT	Draft/Revise Letter	30	75.00		
12/1/2008	PAY	Payment	1	1,072.00		
1/9/2009	LTT	Draft/Revise Letter	45	112.50		
1/9/2009	LTC	Local Telephone Call	6	15.00		
1/9/2009	EMA	Email	20	50.00		
1/10/2009	EMA	Email	15	37.50		
1/12/2009	FAX	EXPENSE-FAX	2	5.20		
2/2/2009	LTT	Draft/Revise Letter	6	15.00		
2/2/2009	POS	EXPENSE-Postage	1	0.42		
2/10/2009	LTT	Draft/Revise Letter	30	75.00		
2/10/2009	WKO	Work On	20	50.00		
3/5/2009	EMA	Email	6	15.00		
3/11/2009	EMA	Email	15	37.50		
3/24/2009	REF	Reviewed File	50	125.00		
3/24/2009	LTT	Draft/Revise Letter	45	112.50		
4/3/2009	CWC	Conference with Client	120	300.00		
4/3/2009	PAY	Payment	1	400.00		
4/5/2009	LTT	Draft/Revise Letter	240	600.00		
4/5/2009	FAX	EXPENSE-FAX	12	31.20		
4/7/2009	PPL	CIVIL-Prepared Pleading	240	600.00		
4/8/2009	CWC	Conference with Client	15	37.50		
4/9/2009	EMA	Email	10	25.00		
4/9/2009	RES	Legal Research	15	37.50		
4/9/2009	LDC	Long Distance Call	10	27.50		
4/9/2009	REF	Reviewed File	120	300.00		
4/9/2009	LTC	Local Telephone Call	10	25.00		
4/9/2009	REF	Reviewed File	45	112.50		
4/30/2009	LTT	Draft/Revise Letter	210	525.00		
5/1/2009	CWE	Conference With Expert	45	135.00		
5/1/2009	LTT	Draft/Revise Letter	65	162.50		
5/2/2009	POS	EXPENSE-Postage	4	1.68		
5/2/2009	CCS	EXPENSE-Copies/Printing	16	8.00		
5/2/2009	FAX	EXPENSE-FAX	8	20.80		
5/2/2009	LTT	Draft/Revise Letter	30	75.00		
5/2/2009	PAY	Payment	1	350.00		
5/11/2009	RAR	Received and Reviewed	10	25.00		
5/11/2009	FAX	EXPENSE-FAX	12	31.20		
5/11/2009	TCA	Telephone Call T/F Attorney	6	15.00		



5/11/2009	TCA	Telephone Call T/F Attorney	15	37.50			
5/12/2009	RES	Legal Research	75	187.50	187.50	Prepare for and attend foreclosure hearing before clerk; attention to post-hearing matters	
5/19/2009	PAY	Payment	1	600.00			
5/25/2009	RES	Legal Research	210	525.00	525.00		
6/1/2009	TRP	Trial Preparation	30	75.00	75.00		
6/2/2009	CWC	Conference with Client	25	62.50	62.50		
6/2/2009	HCL	Hearing-Before Clerk	45	112.50	112.50		
6/2/2009	TRP	Trial Preparation	20	50.00	50.00		
6/12/2009	FAX	EXPENSE-FAX	2	5.20			
6/15/2009	FAX	EXPENSE-FAX	4	10.40			
6/16/2009	RAR	Received and Reviewed	10	25.00			
6/16/2009	RES	Legal Research	10	25.00			
6/16/2009	EMA	Email	6	15.00			
6/16/2009	TCL	Telephone Call T/F Clerk	10	25.00	25.00		
6/16/2009	EMA	Email	15	37.50			
6/18/2009	CCK	Conference with Clerk	20	50.00	50.00		
6/18/2009	FAX	EXPENSE-FAX	1	2.60			
6/22/2009	PAY	Payment	1	600.00			
6/23/2009	FAX	EXPENSE-FAX	1	2.60			
6/23/2009	RAR	Received and Reviewed	6	15.00			
6/24/2009	TCL	Telephone Call T/F Clerk	10	25.00	25.00		
6/24/2009	LTT	Draft/Revise Letter	30	75.00			
6/30/2009	EMA	Email	15	37.50			
6/30/2009	TCT	Telephone Call T/F TAdminstrat	6	15.00			
7/7/2009	EMA	Email	30	75.00			
7/16/2009	FAX	EXPENSE-FAX	2	5.20			
7/16/2009	RAR	Received and Reviewed	6	15.00			
7/17/2009	RAR	Received and Reviewed	10	25.00			
7/20/2009	CCS	EXPENSE-Copies/Printing	14	7.00			
7/20/2009	POS	EXPENSE-Postage	3	1.32			
7/27/2009	PAY	Payment	1	500.00			
7/29/2009	TCA	Telephone Call T/F Attorney	6	15.00			
7/29/2009	RAR	Received and Reviewed	15	37.50			
7/29/2009	FAX	EXPENSE-FAX	2	5.20			
7/29/2009	LTT	Draft/Revise Letter	60	150.00			
7/30/2009	LTT	Draft/Revise Letter	30	75.00			
7/30/2009	EMA	Email	6	15.00			
7/30/2009	CWE	Conference With Expert	20	60.00	60.00	Prepare for and attend foreclosure hearing before superior court judge; attention to post-hearing matters	
7/30/2009	FAX	EXPENSE-FAX	3	7.80			
7/30/2009	LTC	Local Telephone Call	75	187.50			
8/12/2009	CWE	Conference With Expert	30	90.00	90.00		
8/12/2009	PBR	Prepared Brief	75	187.50	187.50		
8/13/2009	CWE	Conference With Expert	20	60.00	60.00		



8/15/2009	PBR	Prepared Brief	45	112.50	112.50		
8/18/2009	TRA	Travel	180	225.00	225.00		
8/18/2009	CCS	EXPENSE-Copies/Printing	69	34.50	34.50		
8/18/2009	HSC	Hearing-Superior Court	90	270.00	270.00		
8/18/2009	CWC	Conference with Client	15	37.50	37.50		
8/18/2009	TRA	Travel	180	225.00	225.00		
8/20/2009	PAY	Payment	1	500.00			
9/9/2009	CWC	Conference with Client	100	250.00			
9/10/2009	PPL	CIVIL-Prepared Pleading	45	112.50			
9/10/2009	PPL	CIVIL-Prepared Pleading	120	300.00			
9/10/2009	PPL	CIVIL-Prepared Pleading	120	300.00			
9/12/2009	PPL	CIVIL-Prepared Pleading	150	375.00			
9/12/2009	PPL	CIVIL-Prepared Pleading	120	300.00			
9/13/2009	TRP	Trial Preparation	300	750.00			
9/13/2009	PPL	CIVIL-Prepared Pleading	90	225.00			
9/14/2009	HSC	Hearing-Superior Court	30	90.00			
9/14/2009	FPL	CIVIL- Filed Pleadings	30	75.00			
9/14/2009	FPL	CIVIL- Filed Pleadings	15	37.50			
9/14/2009	TRA	Travel	90	112.50			
9/14/2009	TRA	Travel	90	112.50			
9/15/2009	SDC	Serve Pleading,Motion,etc	150	375.00			
9/18/2009	TCL	Telephone Call T/F Clerk	10	25.00			
9/18/2009	TCA	Telephone Call T/F Attorney	10	25.00			
9/18/2009	POS	EXPENSE-Postage	6	2.64			
9/18/2009	TCL	Telephone Call T/F Clerk	10	25.00			
9/18/2009	PDC	Prepared Document(s)	15	37.50			
9/18/2009	FAX	EXPENSE-FAX	20	52.00			
9/18/2009	TCA	Telephone Call T/F Attorney	6	15.00			
9/18/2009	TCA	Telephone Call T/F Attorney	6	15.00			
9/19/2009	CWC	Conference with Client	10	25.00			
9/19/2009	CWE	Conference With Expert	15	45.00			
9/24/2009	HSC	Hearing-Superior Court	15	45.00			
9/24/2009	TRA	Travel	90	112.50			
9/24/2009	TRA	Travel	300	375.00			
9/25/2009	FAX	EXPENSE-FAX	6	15.60			
9/25/2009	PDC	Prepared Document(s)	120	300.00			
9/25/2009	ADV	Advance-Expense	1	180.00			
9/30/2009	TRA	Travel	240	300.00			
10/1/2009	CWC	Conference with Client	30	75.00			
10/1/2009	HSC	Hearing-Superior Court	165	495.00			
10/1/2009	TRA	Travel	240	300.00			
10/2/2009	ADV	Advance-Expense	2	20.00			
10/2/2009	CCS	EXPENSE-Copies/Printing	190	95.00			
10/2/2009	POS	EXPENSE-Postage	3	27.56			
10/2/2009	PIB	Post Injunction Bond	15	37.50			
10/2/2009	WKO	Work On	135	337.50			
10/2/2009	PPO	Prepared Order(s)	60	150.00			
10/7/2009	FAX	EXPENSE-FAX	4	10.40			
10/7/2009	RAR	Received and Reviewed	15	37.50			
10/7/2009	PPO	Prepared Order(s)	30	75.00			
10/17/2009	RES	Legal Research	30	75.00			
10/19/2009	PAY	Payment	1	500.00			
10/19/2009	PDC	Prepared Document(s)	75	187.50			
10/19/2009	POS	EXPENSE-Postage	1	4.95			
10/26/2009	EFI	Efile documents with court	20	50.00			
10/26/2009	PDC	Prepared Document(s)	15	37.50			
10/27/2009	TCL	Telephone Call T/F Clerk	6	15.00			
10/27/2009	EFI	Efile documents with court	10	25.00			
10/29/2009	CCS	EXPENSE-Copies/Printing	54	27.00			
10/29/2009	POS	EXPENSE-Postage	2	19.86			
10/29/2009	CCS	EXPENSE-Copies/Printing	8	4.00			
10/30/2009	RES	Legal Research	60	150.00			



10/30/2009	PPM	Prepared Motion	130	325.00			
10/31/2009	PBR	Prepared Brief	180	450.00			
11/1/2009	PBR	Prepared Brief	120	300.00			
11/2/2009	TCA	Telephone Call T/F Attorney	10	25.00			
11/2/2009	PPM	Prepared Motion	75	187.50			
11/2/2009	EFI	Efile documents with court	20	50.00			
11/3/2009	LTT	Draft/Revise Letter	15	37.50			
11/3/2009	LDC	Long Distance Call	10	27.50			
11/3/2009	EFI	Efile documents with court	10	25.00			
11/3/2009	PPO	Prepared Order(s)	15	37.50			
11/4/2009	TCA	Telephone Call T/F Attorney	10	25.00			
11/16/2009	PBR	Prepared Brief	240	600.00			
11/17/2009	PBR	Prepared Brief	55	137.50			
12/15/2009	EMA	Email	10	25.00			
12/16/2009	TCJ	Telephone Call T/F Judge	6	18.00			
12/16/2009	LTC	Local Telephone Call	6	15.00			
12/16/2009	PPO	Prepared Order(s)	15	37.50			
12/16/2009	EMA	Email	6	15.00			
12/23/2009	FAX	EXPENSE-FAX	1	2.60			
12/23/2009	TCL	Telephone Call T/F Clerk	6	15.00			
12/23/2009	LTT	Draft/Revise Letter	20	50.00			
1/12/2010	PBR	Prepared Brief	240	600.00			
1/13/2010	PPB	Prepared Brief/Memorandum	90	225.00			
1/15/2010	ROA	APPEAL- Prepare Record	180	540.00	540.00		
1/16/2010	ROA	APPEAL- Prepare Record	210	630.00	630.00		
1/18/2010	ROA	APPEAL- Prepare Record	270	810.00	810.00		
1/18/2010	RAR	Received and Reviewed	10	25.00			
1/18/2010	FAX	EXPENSE-FAX	2	5.20			
1/22/2010	PAY	Payment	1	500.00			
2/24/2010	ROA	APPEAL- Prepare Record	60	180.00	180.00		
2/26/2010	PPM	Prepared Motion	45	112.50			
2/26/2010	LTT	Draft/Revise Letter	150	375.00			
2/27/2010	PPM	Prepared Motion	90	225.00			
2/27/2010	POS	EXPENSE-Postage	2	2.78			
3/1/2010	PBR	Prepared Brief	180	450.00			
3/9/2010	RAR	Received and Reviewed	10	25.00			
3/9/2010	RAR	Received and Reviewed	10	25.00			
3/9/2010	RES	Legal Research	20	50.00			
3/9/2010	RES	Legal Research	20	50.00			
3/10/2010	ROA	APPEAL- Prepare Record	135	405.00	405.00		
3/10/2010	ROA	APPEAL- Prepare Record	75	225.00	225.00		
3/25/2010	CCS	EXPENSE-Copies/Printing	502	251.00	251.00		
4/16/2010	PPB	Prepared Brief/Memorandum	40	100.00	100.00		
4/20/2010	PPB	Prepared Brief/Memorandum	150	450.00	450.00		
4/21/2010	PBR	Prepared Brief	45	112.50	112.50		
4/21/2010	ADV	Advance-Expense	1	332.50			
4/22/2010	PBR	Prepared Brief	180	450.00	450.00		
4/29/2010	PBR	Prepared Brief	135	337.50	337.50		
4/30/2010	PBR	Prepared Brief	135	337.50	337.50		
4/30/2010	PBR	Prepared Brief	180	450.00	450.00		
5/1/2010	PBR	Prepared Brief	135	337.50	337.50		
5/1/2010	PBR	Prepared Brief	210	525.00	525.00		
5/2/2010	PBR	Prepared Brief	90	225.00	225.00		
5/3/2010	PBR	Prepared Brief	135	337.50	337.50		
5/3/2010	PBR	Prepared Brief	300	750.00	750.00		
5/3/2010	PAY	Payment	1	332.50			
5/6/2010	PBR	Prepared Brief	180	450.00	450.00		
5/6/2010	PBR	Prepared Brief	210	525.00	525.00		
5/11/2010	PAY	Payment	1	500.00			
5/18/2010	ADV	Advance-Expense	1	218.50			
6/10/2010	DDP	CIVIL-Draft Discovery Plan	75	150.00			
6/10/2010	DDP	CIVIL-Draft Discovery Plan	120	360.00			

Attention to  
preparation of  
record on appeal  
and draft brief of  
appellant filed in  
foreclosure case  
on 5/11/10



6/11/2010	DDP	CIVIL-Draft Discovery Plan	120	360.00			
6/11/2010	PAY	Payment	1	500.00			
6/11/2010	CWE	Conference With Expert	65	195.00			
6/12/2010	DDP	CIVIL-Draft Discovery Plan	40	120.00			
6/14/2010	TCA	Telephone Call T/F Attorney	10	25.00			
6/14/2010	RES	Legal Research	30	75.00			
6/14/2010	DDP	CIVIL-Draft Discovery Plan	75	225.00			
6/16/2010	PPB	Prepared Brief/Memorandum	120	300.00	300.00	Draft reply brief of appellant filed in foreclosure case on 6/23/10	
6/16/2010	PPB	Prepared Brief/Memorandum	90	225.00	225.00		
6/17/2010	PPB	Prepared Brief/Memorandum	120	300.00	300.00		
6/19/2010	PPB	Prepared Brief/Memorandum	240	600.00	600.00		
6/21/2010	PPB	Prepared Brief/Memorandum	180	450.00	450.00		
6/21/2010	POS	EXPENSE-Postage	2	3.46			
6/21/2010	PPB	Prepared Brief/Memorandum	45	112.50	112.50		
6/24/2010	TCA	Telephone Call T/F Attorney	6	15.00			
6/28/2010	EMA	Email	10	25.00			
6/28/2010	EMA	Email	6	15.00			
6/28/2010	PDC	Prepared Document(s)	30	75.00			
6/29/2010	TCA	Telephone Call T/F Attorney	10	25.00			
6/29/2010	EMA	Email	10	25.00			
6/29/2010	LTT	Draft/Revise Letter	45	112.50			
6/29/2010	EMA	Email	6	15.00			
7/1/2010	TCA	Telephone Call T/F Attorney	30	75.00			
7/7/2010	ADV	Advance-Expense	1	50.75			
7/9/2010	RES	Legal Research	120	300.00			
7/13/2010	PPM	Prepared Motion	210	525.00			
7/13/2010	CWC	Conference with Client	90	225.00			
7/14/2010	PPM	Prepared Motion	75	187.50			
7/14/2010	CCK	Conference with Clerk	10	25.00			
7/19/2010	PAY	Payment	1	500.00			
7/20/2010	PPB	Prepared Brief/Memorandum	120	300.00			
7/20/2010	PPB	Prepared Brief/Memorandum	120	300.00			
7/27/2010	PPB	Prepared Brief/Memorandum	240	600.00			
7/28/2010	PPB	Prepared Brief/Memorandum	210	525.00			
7/29/2010	PPB	Prepared Brief/Memorandum	240	600.00			
7/30/2010	PPB	Prepared Brief/Memorandum	120	300.00			
7/31/2010	PPB	Prepared Brief/Memorandum	210	525.00			
8/2/2010	PPB	Prepared Brief/Memorandum	240	600.00			
8/2/2010	TRP	Trial Preparation	20	50.00			
8/2/2010	FAX	EXPENSE-FAX	21	54.60			
10/6/2010	PPM	Prepared Motion	180	540.00	540.00	Draft motions to strike and requesting judicial notice filed in foreclosure appeal on 10/7/10 and motion to remand filed on 10/11/10	
10/7/2010	ADV	Advance-Expense	1	21.85			
10/7/2010	TCA	Telephone Call T/F Attorney	15	37.50			
10/7/2010	EMA	Email	15	37.50			
10/7/2010	EMA	Email	45	112.50			
10/7/2010	LTC	Local Telephone Call	30	75.00			
10/7/2010	CCS	EXPENSE-Copies/Printing	70	35.00			
10/7/2010	RES	Legal Research	10	25.00	25.00		
10/8/2010	RES	Legal Research	20	50.00	50.00		
10/8/2010	LDC	Long Distance Call	30	82.50			
10/9/2010	PPM	Prepared Motion	240	600.00			
10/10/2010	EMA	Email	6	15.00			
10/10/2010	PPM	Prepared Motion	210	525.00	525.00		
10/11/2010	PPM	Prepared Motion	300	750.00	750.00		
10/12/2010	PPM	Prepared Motion	210	525.00			



10/12/2010	RAR	Received and Reviewed	20	50.00		14,720.50	Total fees incurred in relation to foreclosure case
10/18/2010	PAY	Payment	1	500.00			
10/20/2010	RES	Legal Research	240	600.00			
10/29/2010	LTT	Draft/Revise Letter	20	50.00			
10/29/2010	CCS	EXPENSE-Copies/Printing	22	11.00			
11/1/2010	RAR	Received and Reviewed	6	15.00			
11/5/2010	WKO	Work On	75	187.50			
11/5/2010	PPN	Prepared Notice of Appeal	30	75.00			
11/8/2010	RES	Legal Research	75	187.50			
11/15/2010	PAI	APPEAL-Prepare Appeal Issues	105	262.50			
11/16/2010	PAI	APPEAL-Prepare Appeal Issues	180	540.00			
11/19/2010	RES	Legal Research	20	50.00			
11/19/2010	PPM	Prepared Motion	75	187.50			
11/19/2010	PDC	Prepared Document(s)	15	37.50			
11/19/2010	EFI	Efile documents with court	10	25.00			
11/20/2010	PPM	Prepared Motion	150	375.00			
11/21/2010	PPM	Prepared Motion	150	375.00			
11/21/2010	CFW	Conference	45	112.50			
11/29/2010	PPB	Prepared Brief/Memorandum	240	600.00			
11/30/2010	PPB	Prepared Brief/Memorandum	240	600.00			
12/2/2010	PDC	Prepared Document(s)	75	187.50			
12/2/2010	TCA	Telephone Call T/F Attorney	10	25.00			
12/2/2010	EFI	Efile documents with court	20	50.00			
12/3/2010	EFI	Efile documents with court	10	25.00			
12/3/2010	PPM	Prepared Motion	195	487.50			
12/3/2010	POS	EXPENSE-Postage	2	1.22			
12/4/2010	PPM	Prepared Motion	75	187.50			
12/15/2010	RAR	Received and Reviewed	6	15.00			
12/15/2010	RAR	Received and Reviewed	6	15.00			
12/16/2010	TCC	Telephone Call T/F Client	15	37.50			
1/4/2011	MDT	CIVIL-Mediation	150	450.00			
1/7/2011	DOA	APPEAL-Draft Oral Argument	225	938.25			
1/21/2011	RES	Legal Research	90	225.00			
1/21/2011	TCC	Telephone Call T/F Client	15	37.50			
1/21/2011	LDC	Long Distance Call	10	27.50			
1/22/2011	RES	Legal Research	120	300.00			
1/24/2011	TCC	Telephone Call T/F Client	10	25.00			
1/24/2011	PBR	Prepared Brief	300	750.00			
1/24/2011	TCC	Telephone Call T/F Client	6	15.00			
1/26/2011	RES	Legal Research	45	112.50			
1/29/2011	PBR	Prepared Brief	90	225.00			
1/31/2011	PBR	Prepared Brief	75	187.50			
2/1/2011	EFI	Efile documents with court	10	25.00			
2/1/2011	POS	EXPENSE-Postage	3	1.32			
2/1/2011	EMA	Email	6	15.00			
2/1/2011	WKO	Work On	45	112.50			
2/1/2011	CCS	EXPENSE-Copies/Printing	10	5.00			
2/1/2011	CCS	EXPENSE-Copies/Printing	102	51.00			
2/2/2011	POS	EXPENSE-Postage	1	4.95			
2/8/2011	PBR	Prepared Brief	75	187.50			
2/9/2011	PBR	Prepared Brief	75	187.50			
2/10/2011	PBR	Prepared Brief	420	1,050.00			
2/14/2011	PDC	Prepared Document(s)	75	187.50			



2/19/2011	PBR	Prepared Brief	75	187.50			
2/19/2011	PBR	Prepared Brief	90	225.00			
2/22/2011	PBR	Prepared Brief	90	225.00			
2/22/2011	PBR	Prepared Brief	120	300.00			
2/22/2011	PBR	Prepared Brief	300	750.00			
2/25/2011	PBR	Prepared Brief	420	1,050.00			
2/26/2011	PBR	Prepared Brief	90	225.00			
2/28/2011	PBR	Prepared Brief	270	675.00			
3/29/2011	PAY	Payment	1	500.00			
4/20/2011	PAY	Payment	1	500.00			
4/21/2011	TCL	Telephone Call T/F Clerk	10	25.00			
4/23/2011	PPM	Prepared Motion	75	187.50			
4/23/2011	PPB	Prepared Brief/Memorandum	90	225.00			
4/25/2011	PPB	Prepared Brief/Memorandum	240	600.00			
4/26/2011	PPB	Prepared Brief/Memorandum	240	600.00			
5/3/2011	RAR	Received and Reviewed	45	112.50			
5/3/2011	PPB	Prepared Brief/Memorandum	90	225.00			
5/3/2011	EMA	Email	20	50.00			
5/3/2011	CWC	Conference with Client	20	50.00			
5/6/2011	PPB	Prepared Brief/Memorandum	75	187.50			
5/9/2011	PPB	Prepared Brief/Memorandum	270	675.00			
5/9/2011	RES	Legal Research	60	150.00			
5/12/2011	PPB	Prepared Brief/Memorandum	240	600.00			
5/13/2011	PPB	Prepared Brief/Memorandum	120	300.00			
5/13/2011	RES	Legal Research	75	187.50			
5/13/2011	CFW	Conference	40	100.00			
5/14/2011	PPB	Prepared Brief/Memorandum	120	300.00			
5/14/2011	CWE	Conference With Expert	75	225.00			
5/15/2011	CWE	Conference With Expert	135	405.00			
5/15/2011	PPB	Prepared Brief/Memorandum	120	300.00			
5/15/2011	PPB	Prepared Brief/Memorandum	210	525.00			
5/16/2011	CWE	Conference With Expert	60	180.00			
5/16/2011	PPB	Prepared Brief/Memorandum	75	187.50			
5/26/2011	PAY	Payment	1	400.00			
6/7/2011	PAY	Payment	1	100.00			
6/15/2011	RAR	Received and Reviewed	30	75.00			
6/16/2011	PDC	Prepared Document(s)	45	112.50			
6/16/2011	EFI	Efile documents with court	20	50.00			
6/17/2011	TCT	Telephone Call T/F Adminstrat	10	25.00			
6/20/2011	TCC	Telephone Call T/F Client	15	37.50			
6/21/2011	TCA	Telephone Call T/F Attorney	30	75.00			
6/21/2011	TCL	Telephone Call T/F Clerk	6	15.00			
6/22/2011	TCL	Telephone Call T/F Clerk	10	25.00			
7/3/2011	PPM	Prepared Motion	45	112.50			
7/4/2011	RES	Legal Research	90	225.00			
7/4/2011	PPM	Prepared Motion	60	150.00			
7/5/2011	PAY	Payment	1	500.00			
7/14/2011	RES	Legal Research	40	100.00			
7/15/2011	CWC	Conference with Client	45	112.50			
7/15/2011	LTT	Draft/Revise Letter	180	450.00			
7/27/2011	TCL	Telephone Call T/F Clerk	15	37.50			
8/9/2011	PAY	Payment	1	500.00			
8/12/2011	CWC	Conference with Client	45	112.50			
8/16/2011	PAY	Payment	1	10,000.00			
8/23/2011	LTT	Draft/Revise Letter	75	187.50			
9/3/2011	RES	Legal Research	240	600.00			
9/13/2011	TCC	Telephone Call T/F Client	10	25.00			
9/13/2011	LTC	Local Telephone Call	10	25.00			
9/13/2011	CWC	Conference with Client	15	37.50			
9/13/2011	CFW	Conference	15	37.50			
9/29/2011	RAR	Received and Reviewed	30	75.00			
9/29/2011	RES	Legal Research	30	75.00			



10/17/2011	PAY	Payment	1	500.00			
10/17/2011	EMA	Email	30	75.00			
10/17/2011	EMA	Email	6	15.00			
10/18/2011	RES	Legal Research	45	112.50			
12/6/2011	MIL	EXPENSE-Mileage	267	146.85			
12/6/2011	TRA	Travel	360	450.00			
12/7/2011	AAP	Appearance in Court	270	810.00			
12/8/2011	AAP	Appearance in Court	180	540.00			
12/8/2011	TRA	Travel	360	450.00			
12/8/2011	MIL	EXPENSE-Mileage	260	143.00			
12/12/2011	RAR	Received and Reviewed	6	15.00			
12/13/2011	CCK	Conference with Clerk	10	25.00			
12/26/2011	DOA	APPEAL-Draft Oral Argument	420	1,751.40			
12/27/2011	DOA	APPEAL-Draft Oral Argument	180	750.60			
1/1/2012	DOA	APPEAL-Draft Oral Argument	90	375.30			
1/2/2012	DOA	APPEAL-Draft Oral Argument	210	875.70			
1/3/2012	DOA	APPEAL-Draft Oral Argument	75	312.75			
1/4/2012	DOA	APPEAL-Draft Oral Argument	120	500.40			
1/5/2012	DOA	APPEAL-Draft Oral Argument	120	500.40			
1/6/2012	DOA	APPEAL-Draft Oral Argument	285	1,188.45			
1/9/2012	DOA	APPEAL-Draft Oral Argument	240	1,000.80			
1/12/2012	DOA	APPEAL-Draft Oral Argument	90	375.30			
1/12/2012	DOA	APPEAL-Draft Oral Argument	75	312.75			
1/13/2012	DOA	APPEAL-Draft Oral Argument	120	500.40			
1/13/2012	DOA	APPEAL-Draft Oral Argument	30	125.10			
1/13/2012	DOA	APPEAL-Draft Oral Argument	210	875.70			
1/20/2012	DOA	APPEAL-Draft Oral Argument	180	750.60			
1/23/2012	MIL	EXPENSE-Mileage	267	146.85			
1/23/2012	TRA	Travel	480	600.00			
1/24/2012	ARG	APPEAL-ORAL ARGUMENT	135	788.40			
1/24/2012	TRA	Travel	390	487.50			
1/24/2012	MIL	EXPENSE-Mileage	260	143.00			
1/30/2012	APA	APPEAL-Supp Authorities	180	540.00			
2/6/2012	APA	APPEAL-Supp Authorities	150	450.00			
2/6/2012	APA	APPEAL-Supp Authorities	120	360.00			
2/23/2012	CWC	Conference with Client	60	150.00			
3/9/2012	PAY	Payment	1	1,000.00			
3/19/2012	PAY	Payment	1	500.00			
3/27/2012	RAR	Received and Reviewed	20	50.00			
3/28/2012	RES	Legal Research	6	15.00			
3/28/2012	TCL	Telephone Call T/F Clerk	15	37.50			
3/28/2012	RES	Legal Research	30	75.00			
3/28/2012	TAP	Telephone T/F Adverse Party	15	41.25			
3/29/2012	TAP	Telephone T/F Adverse Party	10	25.00			
3/30/2012	EMA	Email	30	75.00			
3/30/2012	EFI	Efile documents with court	20	50.00			
4/1/2012	PAY	Payment	1	179.99			
4/3/2012	CFW	Conference	30	75.00			
4/3/2012	LDC	Long Distance Call	30	82.50			
4/3/2012	TCL	Telephone Call T/F Clerk	6	15.00			
4/11/2012	TCC	Telephone Call T/F Client	6	15.00			
4/11/2012	TCC	Telephone Call T/F Client	6	15.00			
4/11/2012	LTC	Local Telephone Call	6	15.00			
4/11/2012	TAP	Telephone T/F Adverse Party	10	32.00			
4/11/2012	PAY	Payment	1	1,000.00			
4/11/2012	RAR	Received and Reviewed	6	15.00			
4/13/2012	FAX	EXPENSE-FAX	4	10.40			
4/13/2012	RAR	Received and Reviewed	20	50.00			
4/14/2012	PPM	Prepared Motion	120	300.00			
4/16/2012	CFW	Conference	15	37.50			
4/16/2012	PPM	Prepared Motion	65	162.50			
4/16/2012	RES	Legal Research	20	50.00			



[illegible]



**EXHIBIT 3**



B 10 Modified (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK		PROOF OF CLAIM
Name of Debtor: <b>GMAC Mortgage, LLC</b>	Case Number: <b>12-12032</b>	
NOTE: This form should not be used to make a claim for an administrative expense (other than a claim asserted under 11 U.S.C. § 503(b)(9)) arising after the commencement of the case. A "request" for payment of an administrative expense (other than a claim asserted under 11 U.S.C. § 503(b)(9)) may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (the person or other entity to whom the debtor owes money or property): <b>GILBERT IN THE MATTER OF THE FORECLOSURE BY DAVID A SIMPSON PC SUBSTITUTE TRUSTEE OF DEED OF TRUST EXECUTED BY et al</b>		<input type="checkbox"/> Check this box if this claim amends a previously filed claim.
Name and address where notices should be sent: NameID: 10987289 <b>GILBERT IN THE MATTER OF THE FORECLOSURE BY DAVID A SIMPSON PC SUBSTITUTE TRUSTEE OF DEED OF TRUST EXECUTED BY et al KATHERINE S PARKER LOWE ATTORNEY AT LAW 35 MISS ELECIA LN STE 101 OCRACOKE, NC 27960</b>		<b>Court Claim Number:</b> _____ (If known) Filed on: _____
Telephone number: <b>252-938-1000</b> email: <b>katherine@ocracokelaw.com</b>		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
Name and address where payment should be sent (if different from above):  Telephone number: _____ email: _____		<b>5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.</b>  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)( ).
<b>1. Amount of Claim as of Date Case Filed:</b> \$ <b>5,948,900.00</b> If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
<b>2. Basis for Claim:</b> <b>recession under TILA, money damages, usury, wrongful foreclosure debt collection violations, UDAP</b> (See instruction #2)		
<b>3. Last four digits of any number by which creditor identifies debtor:</b> <b>5107</b>	<b>3a. Debtor may have scheduled account as:</b> <b>General Litigation - Mtg Contingent, Unliquidated</b> (See instruction #3a)	<b>3b. Uniform Claim Identifier (optional):</b> (See instruction #3b)
<b>4. Secured Claim</b> (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information. <b>Nature of property or right of setoff:</b> <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <b>Describe:</b> <b>Value of Property:</b> \$ _____ <b>Annual Interest Rate</b> _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable (when case was filed) <b>Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:</b> \$ _____ <b>Basis for perfection:</b> _____ <b>Amount of Secured Claim:</b> \$ _____ <b>Amount Unsecured:</b> \$ <b>5,948,900.00</b>		
<b>6. Claim Pursuant to 11 U.S.C. § 503(b)(9):</b> Indicate the amount of your claim arising from the value of any goods received by the Debtor within 20 days before May 14, 2012, the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ <b>N/A</b> (See instruction #6)		
<b>7. Credits.</b> The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #7)		
<b>8. Documents:</b> Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #8, and the definition of "redacted".) <b>See Attached NC COA Decision, Complaint, 4th CA Decision</b> DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING. If the documents are not available, please explain:		
<b>9. Signature:</b> (See instruction #9) Check the appropriate box. <input type="checkbox"/> I am the creditor. <input checked="" type="checkbox"/> I am the creditor's authorized agent. <input type="checkbox"/> I am the trustee, or the debtor, or their authorized agent. <input type="checkbox"/> I am a guarantor, surety, indorser, or other codebtor. (Attach copy of power of attorney, if any.) (See Bankruptcy Rule 3004.) (See Bankruptcy Rule 3005.) I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief. Print Name: <b>Katherine S. Parker - Lowe</b> Title: <b>Attorney for Gilbert</b> Company: _____ (Signature) <b>Katherine S. Parker - Lowe</b> (Date) <b>10-30-2012</b> Address and telephone number (if different from notice address above): Telephone number: _____ Email: _____		

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OCT 30 2012

KURTZMAN CARSON CONSULTANTS

COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.



NO. COA10-361

NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

IN THE MATTER OF THE FORECLOSURE BY  
DAVID A. SIMPSON, P.C., SUBSTITUTE  
TRUSTEE, OF A DEED OF TRUST EXECUTED  
BY REX T. GILBERT, JR. AND DANIELA L.  
GILBERT, HUSBAND AND WIFE, DATED MAY  
5, 2006 AND RECORDED ON MAY 10, 2006,  
IN BOOK 219 AT PAGE 53 OF THE HYDE  
COUNTY PUBLIC REGISTRY

Hyde County  
No. 09 SP 09

Appeal by Respondents from order entered 18 August 2009 by Judge  
Marvin K. Blount, III in Hyde County Superior Court. Heard in the  
Court of Appeals 12 October 2010.

*Katherine S. Parker-Lowe, for respondent-appellants.*

*The Law Office of John T. Benjamin, Jr., P.A., by John T.  
Benjamin, Jr. and James R. White for petitioner-appellee.*

HUNTER, JR., Robert N., Judge.

Respondents Rex T. Gilbert, Jr. and his wife Daniela L. Gilbert,  
appeal from the trial court's Order authorizing David A. Simpson,  
P.C., as Substitute Trustee, to proceed with foreclosure under a  
power of sale in the Deed of Trust recorded in Book 219 at Page 53  
in the Hyde County Register of Deeds. We reverse.



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### **I. Factual and Procedural History**

On 5 May 2006, Respondent Rex T. Gilbert, Jr. executed an adjustable rate note ("the Note") to refinance an existing mortgage on his home. According to the terms of the Note, Mr. Gilbert promised to pay a principal amount of \$525,000.00 plus interest to First National Bank of Arizona. The Note was secured by a Deed of Trust, executed by Mr. Gilbert and his wife, Daniela L. Gilbert, on real property located at 134 West End Road, Ocracoke, North Carolina. The Deed of Trust identified First National Bank of Arizona as the lender and Matthew J. Ragaller of Casey, Grimsley & Ragaller, PLLC as the trustee.

The record reveals that, during 2008, Respondents ceased making payments on the Note and made an unsuccessful attempt to negotiate a modification of the loan. On 9 March 2009, a Substitution of Trustee was recorded in the Hyde County Register of Deeds, which purports to remove Matthew Ragaller as the trustee of the Deed of Trust and appoint his successor, David A. Simpson, P.C. ("Substitute Trustee"). The Substitution of Trustee identified Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 ("Petitioner") as the holder of the Note and the lien created by the Deed of Trust.

On 12 March 2009, the Substitute Trustee commenced this action by filing a Notice of Hearing on Foreclosure of Deed of Trust with



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the Hyde County Clerk of Superior Court pursuant to section 45-21.16 of our General Statutes. N.C. Gen. Stat. § 45-21.16 (2009). The Notice of Hearing stated, "the current holder of the foregoing Deed of Trust, and of the debt secured thereby, is: Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6."

In a letter dated 5 April 2009, Mr. Gilbert purported to exercise his right to rescind the loan transaction he entered into with the original lender, First National Bank of Arizona, pursuant to the federal Truth in Lending Act, 15 U.S.C. § 1635. As justification for his purported rescission, Gilbert alleged that the Truth in Lending Disclosure Statement provided by First National Bank of Arizona failed to accurately provide all required material disclosures including, *inter alia*, the correct annual percentage rate and payment schedule. The Substitute Trustee responded with a letter from GMAC ResCap, in which it denied any material disclosure errors were made and refused to rescind the loan transaction.

The foreclosure hearing was held on 2 June 2009 before the Clerk of Superior Court of Hyde County. The Honorable Sharon G. Sadler entered an Order on 17 June 2009, permitting the Substitute Trustee to proceed with the foreclosure. In the Order, the Clerk specifically found, *inter alia*, that Petitioner was the holder of the Note and Deed of Trust that it sought to foreclose and the Note



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evidenced a valid debt owed by Mr. Gilbert. Respondents appealed the Order to superior court.

The matter came on for a *de novo* hearing on 18 August 2009 before the Honorable Marvin K. Blount, III, in Hyde County Superior Court. During the hearing, the trial court admitted into evidence a certified copy of the Note and the Deed of Trust and two affidavits attesting to the validity of Gilbert's indebtedness pursuant to the Note, and that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note. Additionally, Petitioner introduced the original Note and Allonge for the trial court's inspection.

Reviewing the record before this Court, the Allonge contains a series of indorsements evidencing the alleged assignments of the Note, as follows:

PAY TO THE ORDER OF:  
First National Bank of Nevada  
WITHOUT RECOURSE BY:  
[Signature]  
AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

Pay to the order of:  
RESIDENTIAL FUNDING CORPORATION  
Without Recourse  
FIRST NATIONAL BANK OF NEVADA  
By: [Signature]  
Deutsche Bank National Trust  
Company, F/K/A Bankers Trust  
Company of California, N.A.  
as Custodian as Attorney in Fact



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[Illegible Name and Title]

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation  
BY [Signature]  
Judy Faber, Vice President

Respondents made two arguments at the hearing. First, Respondents argued that the debt evidenced by the Note no longer existed, as Mr. Gilbert had rescinded the transaction for the loan with First National Bank of Arizona. Petitioner objected to Respondents' rescission argument as being a defense in equity and, as such, inadmissible in a proceeding held pursuant to N.C. Gen. Stat. § 45-21.16. The trial court agreed and refused to let Respondents' expert witness testify as to alleged material errors in the Truth in Lending Disclosure Statement, which Mr. Gilbert alleged permitted him the right to rescind the loan. Second, Respondents argued that Petitioner had not produced sufficient evidence to establish that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 was the holder of the Note.

Based on the preceding evidence, the trial court entered an order on 18 August 2009 in which it found, *inter alia*: Mr. Gilbert executed the Note and, with his wife, executed a Deed of Trust in favor of First National Bank of Arizona, secured by the real property described in the Deed of Trust; a valid debt exists and is owed by



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Gilbert to Petitioner; Gilbert is in default under the Note and Deed of Trust; proper notice of the foreclosure hearing was given to all parties as required by N.C. Gen. Stat. § 45-21.16; Petitioner was the current holder of the Note and the Deed of Trust. The trial court concluded as a matter of law that the requirements of N.C. Gen. Stat. § 45-21.16 had been satisfied. Based on these findings and conclusion of law, the trial court authorized the Substitute Trustee to proceed with the foreclosure. Respondents timely entered notice of appeal.

## **II. Analysis**

A party seeking permission from the clerk of court to proceed with a foreclosure pursuant to a power of sale contained in a deed of trust must prove the following statutory requirements: (1) the party seeking foreclosure is the holder of a valid debt, (2) default on the debt by the debtor, (3) the deed of trust provides the right to foreclose, (4) proper notice was given to those parties entitled to notice pursuant to section 45-21.16(b). N.C. Gen. Stat. § 45-21.16(d) (2009). The General Assembly added a fifth requirement, which expired 31 October 2010: "that the underlying mortgage debt is not a subprime loan," or, if it is a subprime loan, "that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed[.]" *Id.* The role of the clerk of court



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is limited to making a determination on the matters specified by section 45-21.16(d). See *Mosler ex rel. Simon v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 295-96, 681 S.E.2d 456, 458 (2009). If the clerk's order is appealed to superior court, that court's *de novo* hearing is limited to making a determination on the same issues as the clerk of court. See *id.*

The trial court's order authorizing the foreclosure to proceed was a final judgment of the superior court, therefore, this Court has jurisdiction to hear the instant appeal. N.C. Gen. Stat. § 7A-27(b) (2009). Our standard of review for this appeal, where the trial court sat without a jury, is "whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Adams*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 693 S.E.2d 705, 708 (2010) (quoting *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000)).

We note the trial court classified multiple conclusions of law as "findings of fact." We have previously recognized "[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Generally, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law."



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*Id.* (citations omitted). Any determination made by "logical reasoning from the evidentiary facts," however, "is more properly classified a finding of fact." *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). When this Court determines that findings of fact and conclusions of law have been mislabeled by the trial court, we may reclassify them, where necessary, before applying our standard of review. *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (citing *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675).

Looking to the trial court's Order, we conclude that the following "findings of fact" are determinations that required the application of legal principles and are more appropriately classified as conclusions of law: a valid debt exists and is owed to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6; proper notice was given to and received by all parties as required by N.C. Gen. Stat. § 45-21.16 and the Rules of Civil Procedure; Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust. See *In re Watts*, 38 N.C. App. 90, 92, 247 S.E.2d 427, 428 (1978) (noting upon the appeal of a N.C. Gen. Stat. § 45-21.16 special proceeding the trial court's conclusions of law included the existence of a valid debt, the right to foreclose under the deed of



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trust, and proper notice to the mortgagors); *see also Connolly v. Potts*, 63 N.C. App. 547, 549, 306 S.E.2d 123, 124 (1983) (same). In light of this reclassification of the trial court's findings of fact and conclusions of law, we turn to the issues raised on appeal.

### **1. Rescission of the Loan Transaction**

Respondents raise several arguments alleging the trial court erred by refusing to consider their defense to the foreclosure action, that the debt Petitioner sought to foreclose was not a valid debt—a required element under the statute for foreclosure by power of sale. *See* N.C. Gen. Stat. § 45-21.16(d)(i) (requiring, *inter alia*, that the clerk of court must determine that a valid debt exists). Respondents contend the debt is not valid because Mr. Gilbert rescinded the transaction by which he obtained the loan from First National Bank of Arizona pursuant to the federal Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, and the Federal Reserve Board's Regulation Z, 12 C.F.R. § 226.1-.58. We conclude the trial court did not err.

The admissibility of evidence in the trial court is based upon that court's sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion. *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004). Here, we conclude the trial court properly refused to consider Respondents' evidence of rescission. Rescission under the TILA is



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an equitable remedy. See *Am. Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 819 (4th Cir. 2007) ("[A]lthough the right to rescind [under the TILA] is [statutory], it remains an equitable doctrine subject to equitable considerations." (quoting *Brown v. Nat'l Permanent Fed. Sav. & Loan Ass'n*, 683 F.2d 444, 447 (D.C. Cir. 1982))). While legal defenses to a foreclosure under a power of sale are properly raised in a hearing held pursuant to section 45-21.16, equitable defenses are not. *Watts*, 38 N.C. App. at 94, 247 S.E.2d at 429. As we have previously stated, a hearing under section 45-21.16 is "not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief." *Id.* A party seeking to raise an equitable defense may do so in a separate civil action brought in superior court under section 45-21.34. *Id.*; N.C. Gen. Stat. § 45-21.34 (2009) (stating that a party with a legal or equitable interest in the subject property may apply to a superior court judge to enjoin a sale of the property upon legal or equitable grounds). Accordingly, the trial court properly concluded Respondents' argument that Mr. Gilbert had rescinded the loan transaction, invaliding the debt Petitioner sought to foreclose, was an equitable defense and not properly before the trial court. Respondents' argument is without merit.<sup>1</sup>

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<sup>1</sup> During the pendency of this action, the Gilberts filed a



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**2. Evidence that Petitioner was the Owner and Holder  
of Mr. Gilbert's Promissory Note**

Respondents also argue the trial court erred in ordering the foreclosure to proceed, as Petitioner did not prove that it was the holder of the Note with the right to foreclose under the instrument as required by section 45-21.16(d)(i) and (iii). We agree.

A "foreclosure under a power of sale is not favored in the law and its exercise will be watched with jealousy." *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993) (citations and internal quotation marks omitted). That the party seeking to foreclose on a promissory note is the holder of said note is an essential element of the action and the debtor is "entitled to demand strict proof of this element." *Liles v. Myers*, 38 N.C. App. 525, 528, 248 S.E.2d 385, 388 (1978).

For the trial court to find sufficient evidence that Petitioner is the holder of a valid debt in accordance with section 45-21.16(d), "this Court has determined that the following two questions must be

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separate action against Deutsche Bank Trust Company Americas, Residential Funding, LLC, GMAC Mortgage, LLC, and David A. Simpson, P.C. to litigate, *inter alia*, their TILA claim in Hyde County Superior Court. The defendants removed the action to federal court. See *Gilbert v. Deutsche Bank Trust Co. Americas*, slip op. at 1, 4:09-CV-181-D, 2010 WL 2696763 (E.D.N.C. July 7, 2010), *reconsideration denied*, 2010 WL 4320460 (E.D.N.C. Oct. 19, 2010). Because the Gilberts' claim was filed more than three years after the loan transaction was completed, the federal trial court dismissed the action for failure to state a claim upon which relief could be granted. *Id.* at \_\_, slip op. at 5.



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answered in the affirmative: (1) 'is there sufficient competent evidence of a valid debt?'; and (2) 'is there sufficient competent evidence that [the party seeking to foreclose is] the holder[ ] of the notes [that evidence that debt]?'" *Adams*, \_\_ N.C. App. at \_\_, 693 S.E.2d at 709 (quoting *In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804-05 (1978)); see N.C. Gen. Stat. § 45-21.16(d) (2009) (in order for the foreclosure to proceed, the clerk of court must find, *inter alia*, the existence of a "valid debt of which the party seeking to foreclose is the holder," and a "right to foreclose under the instrument" securing the debt) (emphasis added).

Establishing that a party is the holder of the note is essential to protect the debtor from the threat of multiple judgments on the same note.

If such proof were not required, the plaintiff could negotiate the instrument to a third party who would become a holder in due course, bring a suit upon the note in her own name and obtain a judgment in her favor. . . . Requiring proof that the plaintiff is the holder of the note at the time of her suit reduces the possibility of such an inequitable occurrence.

*Liles*, 38 N.C. App. at 527, 248 S.E.2d at 387.

We have previously determined that the definition of "holder" under the Uniform Commercial Code ("UCC"), as adopted by North Carolina, controls the meaning of the term as it used in section 45-21.16 of our General Statutes for foreclosure actions under a



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power of sale. See *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125; *Adams*, \_\_\_ N.C. App. at \_\_\_, 693 S.E.2d at 709. Our General Statutes define the "holder" of an instrument as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." N.C. Gen. Stat. § 25-1-201(b) (21) (2009); *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980). Furthermore, a "[p]erson" means an individual, corporation, business trust, estate, trust . . . or any other legal or commercial entity." N.C. Gen. Stat. § 25-1-201(b) (27) (2009).

As addressed above, we conclude the trial court properly found that a valid debt existed. The remaining issue before this Court is whether there was competent evidence that Petitioner was the holder of the Note that evidences Mr. Gilbert's debt.

In support of its argument that it provided competent evidence to support the trial court's findings, Petitioner first points to its production of the original Note with the Allonge at the *de novo* hearing, as well as its introduction into evidence true and accurate copies of the Note and Allonge. Petitioner asserts this evidence "plainly evidences the transfers" of the Note to Petitioner. We cannot agree.

Under the UCC, as adopted by North Carolina, "[a]n instrument is transferred when it is delivered by a person other than its issuer



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for the purpose of giving to the person receiving delivery the right to enforce the instrument." N.C. Gen. Stat. § 25-3-203(a) (2009). Production of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument, as demonstrated in *Connolly*, 63 N.C. App. at 551, 306 S.E.2d at 125, and *Smathers v. Smathers*, 34 N.C. App. 724, 726, 239 S.E.2d 637, 638 (1977) (holding that despite evidence of voluntary transfer of promissory notes and the plaintiff's possession thereof, the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank. "[T]he plaintiff testified to some of the circumstances under which she obtained possession of the notes, but the trial court made no findings of fact with respect thereto.")

In *Connolly*, determining who had possession of the note became the critical question for the foreclosure proceeding. 63 N.C. App. at 551, 306 S.E.2d at 125. Several years prior to the foreclosure proceedings at issue in *Connolly*, the petitioners obtained a loan from a bank and pledged as collateral a promissory note that was payable to the petitioners by assigning and delivering the note to the bank. *Id.* at 549, 306 S.E.2d at 124. After obtaining their loan, the petitioners sought to foreclose on the promissory note and deed of trust, which was in the bank's possession, but were denied



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at the special proceeding before the clerk of court. *Id.* at 548, 306 S.E.2d at 124. The petitioners appealed the decision to superior court. *Id.* During the *de novo* hearing, the petitioners testified their loan to the bank had been paid, but "they had left the [] note at the bank, for security purposes." *Id.* at 551, 306 S.E.2d at 125. The petitioners, however, "introduced the originals of the note and deed of trust" during the hearing. *Id.* The trial court found the bank was in possession of the note and concluded, as a matter of law, the petitioners were not the holders of the note at the institution of the foreclosure proceedings; the foreclosure was again denied. *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 124-25. On appeal, this Court concluded that despite the fact that the party seeking foreclosure introduced the original note at the time of the *de novo* hearing, the trial court's findings of fact did not address whether the petitioners were in possession of the note at the time of the trial; the trial court's judgment was vacated and remanded. *Id.* at 551, 306 S.E.2d at 125-26.

Similarly, here, the trial court's findings of fact do not address who had possession of Mr. Gilbert's note at the time of the *de novo* hearing. Without a determination of who has physical possession of the Note, the trial court cannot determine, under the UCC, the entity that is the holder of the Note. See N.C. Gen. Stat. § 25-1-201(b)(21) (defining "holder" as "the person *in possession*



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of a negotiable instrument that is payable either to bearer or to an identified person that is the person *in possession*") (emphasis added); *Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125 ("It is the fact of possession which is significant in determining whether a person is a holder, and the *absence of possession defeats that status.*") (emphasis added). Accordingly, the trial court's findings of fact do not support the conclusion of law that Petitioner is the holder of Mr. Gilbert's note.

Assuming *arguendo* that production of the Note was evidence of a transfer of the Note pursuant to the UCC and that Petitioner was in possession of the Note, this is not sufficient evidence that Petitioner is the "holder" of the Note. As discussed in detail below, the Note was not indorsed to Petitioner or to bearer, a prerequisite to confer upon Petitioner the status of holder under the UCC. See N.C. Gen. Stat. § 25-1-201(b)(21) (requiring that, to be a holder, a person must be in possession of the note payable to bearer or to the person in possession of the note). "[M]ere possession' of a note by a party to whom the note has neither been indorsed nor made payable 'does not suffice to prove ownership or holder status.'" *Adams*, \_\_\_ N.C. App. at \_\_\_, 693 S.E.2d at 710 (quoting *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 203, 271 S.E.2d at 57).



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Petitioner acknowledges that following the signing of the Note by Mr. Gilbert, the Note was sequentially assigned to several entities, as indicated by the series of indorsements on the Allonge, reprinted above. Respondents argue these indorsements present two problems. First, Respondents state that Petitioner did not provide any evidence to establish that Deutsche Bank National Trust Company had the authority, as the attorney-in-fact for First National Bank of Nevada, to assign the Note to Residential Funding Corporation in the second assignment. Respondents make no argument—and cite no authority to establish—that such evidence is needed. Therefore, we do not address the merits of this alleged error and deem it abandoned. See N.C. R. App. P. 28(6) (2011) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”)

Second, Respondents argue Petitioner has not offered sufficient evidence that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 was the holder of the Note and, thus, the party entitled to proceed with the foreclosure action. We agree.

Respondents note the third and final assignment on the Allonge was made to “Deutsche Bank Trust Company Americas as Trustee,” which is not the party asserting a security interest in Respondents’ property; this action was brought by Deutsche Bank Trust Company



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Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6, the entity the trial court found to be the owner and holder of the Note. Section 3-110 of the UCC, as codified in our General Statutes, states in pertinent part:

For the purpose of determining the *holder* of an instrument, the following rules apply:

. . . . .

(2) If an instrument is payable to (i) a trust, an estate, or a *person described as trustee* or representative of a trust or estate, the instrument is *payable to the trustee*, the representative, or a successor of either, whether or not the beneficiary or estate is also named . . . . .

N.C. Gen. Stat. § 25-3-110(c) (2009) (emphasis added).

Additionally, the official comments to this section of the UCC state, in part, "This provision merely determines who can deal with an instrument as a holder. It does not determine ownership of the instrument or its proceeds." *Id.* § 25-3-110, Official Comment 3.

In the present case, the Note is clearly indorsed "PAY TO THE ORDER OF Deutsche Bank Trust Company Americas as Trustee." Thus, pursuant to section 25-3-110(c)(2), the Note is payable to Deutsche Bank Trust Company Americas as Trustee. *See Id.* Because the indorsement does not identify Petitioner and is not indorsed in blank or to bearer, it cannot be competent evidence that Petitioner is the holder of the Note. *See* N.C. Gen. Stat. § 25-1-201(b)(21) (defining



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"holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"); *Econo-Travel Motor Hotel Corp.*, 301 N.C. at 204, 271 S.E.2d at 57 (concluding that where the defendants produced a copy of the note indorsed to an entity other than the plaintiff, the "defendants established that plaintiff was not the owner or holder of the note").

In addition to the Note and Allonge, Petitioner points to two affidavits provided by two GMAC Mortgage employees as further evidence that the trial court's findings are based on sufficient competent evidence. Again, we disagree.

The first affidavit is an Affidavit of Indebtedness by Jeffrey Stephan ("Stephan").<sup>2</sup> In his affidavit, Stephan averred, inter

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<sup>2</sup> This Court finds troubling that GMAC Mortgage, LLC was recently found to have submitted a false affidavit by Signing Officer Jeffrey Stephan in a motion for summary judgment against a mortgagor in the United States District Court of Maine. Judge John H. Rich, III concluded that GMAC Mortgage submitted Stephan's false affidavit in bad faith and levied sanctions against GMAC Mortgage, stating:

[T]he attestation to the Stephan affidavit was not, in fact, true; that is, Stephan did not know personally that all of the facts stated in the affidavit were true. . . . GMAC [Mortgage] was on notice that the conduct at issue here was unacceptable to the courts, which rely on sworn affidavits as admissible evidence in connection with motions for summary judgment. In 2006, an identical jurat signed under identical circumstances resulted in the imposition of sanctions against GMAC [Mortgage] in Florida.



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alia, he was a limited signing officer for GMAC Mortgage, the sub-servicer of Mr. Gilbert's loan, and as such, was "familiar with the books and records of [GMAC Mortgage], specifically payments made pursuant to the Note and Deed of Trust." Accordingly, Stephan testified as to the principal amount of Mr. Gilbert's loan and to his history of loan payments. Stephan further testified that after the Note and Deed of Trust were executed they were "delivered" to the original lender, First National Bank of Arizona; the original lender then "assigned and transferred all of its right, title and interest" to First National Bank of Nevada, which, in turn, assigned all its rights, title, and interest in the instruments to Residential Funding Corporation. The final assignment to which Stephan averred is an assignment and securitization of the Note and Deed of Trust from Residential Funding Corporation to "Deutsche Bank Trust Company Americas as Trustee." Stephan then makes the conclusory statement, "Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust described herein."

Whether Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of the Note and Deed of Trust is a legal conclusion that is



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to be determined by a court of law on the basis of factual allegations. As such, we disregard Stephan's conclusion as to the identity of the "owner and holder" of the instruments. See *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) ("Statements in affidavits as to opinion, belief, or conclusions of law are of no effect." (quoting 3 Am. Jur. 2d, *Affidavits* § 13 (2002))); see also *Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, \_\_ N.C. App. \_\_, \_\_ n.2, \_\_ S.E.2d \_\_, \_\_ n.2, slip op. at 12 n.2, No. 09-1451 (Feb. 15, 2011) (rejecting a party's contention that this Court must accept as true all statements found in the affidavits in the record, stating, "our standard of review does not require that we accept a witness' characterization of what 'the facts' mean"). While Stephan referred to a Pooling and Servicing Agreement ("PSA") that allegedly governs the securitization of the Note to Deutsche Bank Trust Company Americas as Trustee, the PSA was not included in the record and will not be considered by this Court. See N.C. R. App. P. 9(a) (2011) ("In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.") The record is void of any evidence the Note was assigned and securitized to a trust.

We also note that Stephan alleged no facts as to who possesses Mr. Gilbert's note, other than his averment that the Note was



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"delivered" to the original lender, First National Bank of Arizona. Stephan referred to a statement made by counsel for GMAC Mortgage that the original Note "would be brought to the foreclosure hearing," but he did not provide any facts from which the trial court could determine who has possession of the Note. As demonstrated by *Connolly*, discussed above, production of a note at trial is not conclusive evidence of possession. 63 N.C. App. at 551, 306 S.E.2d at 125. Thus, we conclude Stephan's affidavit is not competent evidence to support the trial court's conclusion that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the owner and holder of Mr. Gilbert's note.

Petitioner also provided the affidavit of Scott Zeitz ("Zeitz"), who alleged in his affidavit to be a litigation analyst for GMAC Mortgage. Zeitz's basis for his affidavit testimony is that he works with "the documents that relate to account histories and account balances of particular loans" and that he is familiar with Mr. Gilbert's account. Accordingly, Zeitz testified to the details of Mr. Gilbert's loan and the terms of the Note. Zeitz's affidavit, substantially similar to the affidavit of Jeffrey Stephan, also averred to the transfer of the Note and Deed of Trust through the series of entities indicated on the Allonge, stating in part:

Residential Funding Corporation sold, assigned and transferred all of its right, title and interest in and to the Note and Deed of Trust



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to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. *This is reflected on the Allonge to the Note, a true and accurate copy of which is attached and incorporated hereto as EXHIBIT 5. (Emphasis added.)*

This statement is factually incorrect; the Allonge in the record contains no indorsement to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6. Zeitz further stated that "Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 is the current owner and holder of the Note and Deed of Trust." This statement is a legal conclusion postured as an allegation of fact and as such will not be considered by this Court. *See Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 349.

Unlike Jeffrey Stephan, Zeitz stated that Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 "has possession of the original Note and Deed of Trust." We note, however, that "[w]hen an affiant makes a conclusion of fact, it must appear that the affiant had an opportunity to observe and did observe matters about which he or she testifies." *Lemon*, 164 N.C. App. at 622, 596 S.E.2d at 348-49 (quoting 3 Am. Jur. 2d *Affidavits* § 13) (internal quotation marks omitted). Moreover,

[t]he personal knowledge of facts asserted in an affidavit is not presumed from a mere positive averment of facts but rather the court should be shown how the affiant knew or could



PUBLISHED

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

REX T. GILBERT, JR.; DANIELA L.  
GILBERT,

*Plaintiffs-Appellants,*

v.

RESIDENTIAL FUNDING LLC; GMAC  
MORTGAGE LLC; DEUTSCHE BANK  
TRUST COMPANY AMERICAS, as  
Trustee for Residential Accredit  
Loans, Incorporated,

*Defendants-Appellees,*

and

DAVID A. SIMPSON, Substitute  
Trustee,

*Trustee.*

No. 10-2295

Appeal from the United States District Court  
for the Eastern District of North Carolina, at Raleigh.  
James C. Dever III, District Judge.  
(4:09-cv-00181-D)

Argued: January 24, 2012

Decided: May 3, 2012

Before TRAXLER, Chief Judge, FLOYD, Circuit Judge,  
and J. Michelle CHILDS, United States District Judge for  
the District of South Carolina, sitting by designation.

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Affirmed in part, reversed in part, and remanded by published opinion. Judge Floyd wrote the opinion, in which Chief Judge Traxler and Judge Childs joined.

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### COUNSEL

**ARGUED:** Katherine Suzanne Parker-Lowe, Ocracoke, North Carolina, for Appellants. Marc James Ayers, BRADLEY ARANT BOULT CUMMINGS, LLP, Birmingham, Alabama, for Appellees. **ON BRIEF:** Nicholas J. Voelker, BRADLEY ARANT BOULT CUMMINGS, LLP, Charlotte, North Carolina, Jonathan M. Hooks, BRADLEY ARANT BOULT CUMMINGS, LLP, Birmingham, Alabama, for Appellees.

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### OPINION

FLOYD, Circuit Judge:

Rex and Daniela Gilbert appeal the district court's dismissal of their claim that Deutsche Bank Trust Company Americas (Deutsche), as trustee for Residential Accredit Loans, Inc. (RAL); David A. Simpson (Simpson), substitute trustee; Residential Funding LLC (RFL); and GMAC Mortgage LLC (GMAC) violated various consumer protection laws in connection with a mortgage the Gilberts secured on their home, located at 134 West End Road, Ocracoke, North Carolina (the subject property). Specifically, the Gilberts allege that they are entitled to relief on account of violations of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667(f), and its implementing regulation, Regulation Z, 12 C.F.R. § 1026 (previously codified at 12 C.F.R. § 226); North Carolina usury law, N.C. Gen. Stat. § 24; the North Carolina Unfair and Deceptive Trade Practices Act (NCUDTPA), *id.* § 75-1.1; and North Carolina's Prohibited Acts by Debt Col-



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GILBERT V. RESIDENTIAL FUNDING LLC

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lectors statute, *id.* § 75-50. The Gilberts also claim a breach of contract and that Deutsche lacks the authority to enforce the loan.

Appellees filed a motion to dismiss, which the district court granted. The Gilberts timely appealed. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

I.

We review the district court's decision granting a motion to dismiss *de novo*, and we view the facts in the light most favorable to the non-prevailing party. *See Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999).

On May 5, 2006, Rex Gilbert executed an adjustable rate note with First National Arizona to refinance the existing lien on the subject property. Pursuant to the terms of the note, Mr. Gilbert agreed to pay a principal amount of \$525,000, plus interest to the bank. The Gilberts executed a deed of trust on the subject property to secure the note. As a part of the transaction, First National Arizona provided several disclosures, including a "Truth in Lending Disclosure Statement," a "Notice of Right to Cancel," a "Variable Rate Mortgage Program Disclosure," a "HUD-1 Settlement Statement," and a "First Payment Letter."

Thereafter, according to the district court, First National Arizona transferred its interest in the Gilberts' mortgage to First National Bank of Nevada, First National Bank of Nevada transferred its interest in the mortgage to RFL, and RFL sold its interest to Deutsche, as the trustee for RAL. *Gilbert v. Deutsche Bank Trust Co. Ams.*, No. 09-CV-181-D, 2010 WL 2696763, at \*1 (E.D.N.C. July 7, 2010). Thus, the district court stated, Deutsche, as the trustee for RAL, currently owns and holds the note and deed of trust on the subject



property. *Id.* RFC is the master servicer and GMAC is the subservicer. *Id.* at \*2.

The Gilberts defaulted on the loan in 2008. Subsequently, Deutsche chose Simpson as the substitute trustee of the deed of trust. *Id.* On March 12, 2009, Simpson filed a foreclosure action against the Gilberts in the Hyde County Superior Court.

The Gilberts' counsel wrote a letter to GMAC dated April 5, 2009, in which she alleged several violations of TILA, provided notice that the Gilberts were rescinding their mortgage transaction, and requested that GMAC cancel its security interest in the subject property and return all consideration paid by the Gilberts. In a letter dated April 14, 2009, counsel for GMAC responded that GMAC had reviewed the Gilberts' file and found "no basis to conclude that there were any material disclosure errors that would give rise to an extended right of rescission." As such, counsel for GMAC stated that they would not rescind the transaction.

On June 2, 2009, the Clerk of the Hyde County Superior Court conducted a foreclosure hearing, after which she entered a June 17, 2009, order allowing Simpson to proceed with the foreclosure. According to the order, the Clerk found that Deutsche was the holder of the subject note and deed of trust and that the note evidenced a valid debt. The Gilberts appealed to the Hyde County Superior Court.

Following a de novo hearing on the matter on August 18, 2009, the superior court allowed the foreclosure proceeding to go forward. In doing so, the court relied in part on an affidavit signed by Jeffrey Stephan, a signing officer for GMAC, certifying the validity of the indebtedness pursuant to the note as well as Deutsche's status as the current owner and holder of the note. The Gilberts appealed that decision to the North Carolina Court of Appeals.



On September 14, 2009, while their appeal was pending, the Gilberts filed suit in the Hyde County Superior Court against Appellees seeking, among other things, to enjoin the mortgage foreclosure sale and to rescind their May 5, 2006, loan. They alleged violations of TILA by Appellees. The Gilberts also claimed that Appellees violated North Carolina usury law, engaged in unfair and deceptive trade practices, engaged in prohibited debt collection acts, and breached the mortgage contract. The Gilberts further maintained that Deutsche was without authority to enforce the note because of a defect in the allonge, which granted Deutsche an interest in the note.

Appellees removed the Gilberts' suit to the district court and subsequently filed a motion to dismiss the complaint, which the district court granted. This appeal, in which the Gilberts contest the district court's dismissal of their TILA, usury, and NCUDTPA claims, followed. They also assign error to the district court's determination that res judicata barred them from raising claims related to the endorsement on the allonge to the note, as well as the district court's denial of their motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

After becoming aware that Stephan had engaged in improper affidavit practices in unrelated cases, the Gilberts filed with the district court a motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and Rule 12.1 of the Federal Rules of Appellate Procedure. In light of this new evidence, they requested that the district court file an order indicating whether it would be inclined to relieve them of its prior order dismissing their claims and its denial of their Rule 59(e) motion.

On May 3, 2011, the North Carolina Court of Appeals reversed the superior court's decision to allow Simpson to proceed with a foreclosure sale, finding that "the record is lacking of competent evidence sufficient to support that



[Deutsche] is the owner and holder of Mr. Gilbert's note and deed of trust." *In re Simpson*, 711 S.E.2d 165, 175 (N.C. Ct. App. 2011). The court was also troubled by the fact "that [GMAC] was recently found to have submitted a false affidavit by Signing Officer Jeffrey Stephan in a motion for summary judgment against a mortgagor in the United States District Court of Maine." *Id.* at 173 n.2. The Gilberts subsequently supplemented their Rule 60(b) motion with a copy of the *Simpson* opinion.

On June 15, 2011, the district court filed an order stating that "should the Fourth Circuit return jurisdiction to this court, the court would grant the [Rule 60(b)] motion, dismiss the federal claims for the reasons stated in the July 7, 2010[,] order [dismissing all of the Gilberts' claims], and remand all state-law claims to Hyde County Superior Court." *Gilbert v. Deutsche Bank Trust Co. Ams.*, No. 4:09-CV-181-D (E.D.N.C. June 15, 2011). In light of this order, the Gilberts filed a motion with us to reverse and remand the case to the district court. We denied the motion. Accordingly, we now undertake a de novo review of each of the Gilberts' assignments of error. *See Chaudhry*, 186 F.3d at 504.

## II.

### A.

The Gilberts first argue that the district court erred in dismissing their TILA claim on the basis that they had failed to exercise their extended right to rescind in a timely manner.

In adopting TILA, Congress declared that "[i]t is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). As such, TILA requires that a creditor make certain material disclosures at the time the loan is made. *Id.* § 1638(a). If the



creditor fails to comply with this mandate, the borrower has the right to rescind up to three years after the transaction. *Id.* § 1635(f).

The Gilberts closed the loan with First National Arizona on May 5, 2006, but they did not file the instant lawsuit until September 14, 2009. They notified GMAC by letter, however, that they were exercising their right to rescind in April 2009. So, although the Gilberts did not file this lawsuit within three years of closing the loan, they did notify GMAC that they were exercising their right to rescind during that three-year time period.

There is a split of authority as to whether the borrower must file a lawsuit within three years after the consummation of a loan transaction to exercise her right to rescind, or whether the borrower need only assert the right to rescind through a written notice within the three-year period. For example, in *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), the Ninth Circuit held that "rescission suits must be brought within three years from the consummation of the loan, regardless [of] whether notice of rescission is delivered within that three-year period." *Id.* at 1328. But, in *In re Hunter*, 400 B.R. 651 (Bankr. N.D. Ill. 2009), the bankruptcy court held that "TILA gives a consumer the right to rescind a credit transaction simply by notifying the creditor, within a specific period of time, that she intends to do so." *Id.* at 659.

The district court cited *American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815 (4th Cir. 2007), for the proposition that the Gilberts were required to file suit to exercise their right of rescission. Thus, in that the Gilberts failed to file suit until after the three years passed, the district court dismissed their rescission claim. As explained below, however, we are convinced that the Gilberts exercised their right to rescind when they sent their April 5, 2009, letter to GMAC, alleging several violations of TILA and Regulation Z, and providing



notice of their rescission of the mortgage transaction. Moreover, we do not think that our prior decision in *Shelton* compels a contrary conclusion. Further, we disagree with the Ninth Circuit that a borrower must file a lawsuit within the three-year time period to exercise her right to rescind, as opposed simply to notifying the creditor.

We begin, as we must, with the plain meaning of the statute. "The starting point for any issue of statutory interpretation . . . is the language of the statute itself." *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

In the same way, our interpretation of regulations begins with their text. *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003). "The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." *Id.* In most cases, a textual reading will be dispositive. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Furthermore, "absent some obvious repugnance to the statute, the . . . regulation implementing [TILA] should be accepted by the courts." *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981).

Here, we are primarily concerned with just one statute and one regulation. Section 1635(f) provides, in relevant part, the following:

An obligor's right of rescission shall expire three years after the date of consummation of the transac-



tion or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor . . . .

15 U.S.C. § 1635(f). Its implementing regulation, Regulation Z, states as follows:

To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.

12 C.F.R. § 1026.23(a)(2). Taking the plain meaning of these texts, and assuming that the words say what they mean and mean what they say, we come to the conclusion that the Gilberts exercised their right to rescind with the April 5, 2009, letter. Simply stated, neither 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.

But what about the *Shelton* case that the district court relied upon in reaching a different conclusion? There, the creditor filed an action seeking a declaratory judgment that the processing of the borrowers' home refinancing loan complied with TILA. 486 F.3d at 817. The borrowers counterclaimed, requesting damages for violations of TILA. *Id.* They also sought rescission and a declaration by the district court that the defendant had forfeited the loan principal pursuant to TILA. *Id.*

We stated that the "unilateral notification of cancellation does not automatically void the loan contract." *Id.* at 821. "[O]therwise, a borrower could get out from under a secured



loan simply by claiming TILA violations, whether or not the lender had actually committed any." *Id.* (quoting *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1172 (9th Cir. 2003)) (internal quotation marks omitted).

We must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed and the contract voided. The former is the concern of § 1635(f) and Regulation Z, and a borrower exercises her right of rescission by merely communicating in writing to her creditor her intention to rescind. To complete the rescission and void the contract, however, more is required. Either the creditor must "acknowledge[ ] that the right of rescission is available" and the parties must unwind the transaction amongst themselves, or the borrower must file a lawsuit so that the court may enforce the right to rescind. *Shelton*, 486 F.3d at 821 (quoting *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 54-55 (1st Cir. 2002)) (internal quotation marks omitted).

At this stage of the litigation, we are not concerned with whether the contract has been effectively voided. A court must make a determination on the merits as to whether that should occur. Instead, the question presented here is whether the Gilberts exercised their right to rescind with the April 5, 2009, letter. Based on the plain meaning of the applicable statute and regulation, we answer that question in the affirmative.

Appellees' reliance on *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), is misplaced. The *Beach* Court did not address the proper method of exercising a right to rescind or the timely exercise of that right. Instead, in *Beach*, the Court looked at "whether § 1635(f) is a statute of limitation, that is, 'whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim' or 'merely to bar the remedy for its enforcement.'" *Id.* at 416 (alteration in orig-



inal) (quoting *Midstate Horticultural Co. v. Pa. R.R. Co.*, 320 U.S. 356, 358-59 (1943)). The Court stated the following:

Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. . . . It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous.

*Id.* at 417. In other words, the three-year limitation in 15 U.S.C. § 1635 concerns the extinguishment of the right of rescission and does not require borrowers to file a claim for the invocation of that right. Thus, that the Gilberts failed to seek enforcement of their right to rescind within the three years does nothing to take away from the fact that they exercised their right of rescission within that time period.

B.

Next, the Gilberts argue that the district court's decision to dismiss their claim for rescission on the basis that Appellees are assignees and not creditors was improper. Appellees do not appear to disagree.

Section 1641(c) states, "Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation." 15 U.S.C. § 1641(c). The district court's holding to the contrary is reversible error.

C.

According to the Gilberts, the district court also erred in deciding that all of their money damages under TILA are barred by the one-year statute of limitations. We agree.



Section 1640(e) provides a one-year statute of limitations for the filing of a suit once a violation of TILA has occurred. *Id.* ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."). The alleged TILA disclosure violations occurred on May 5, 2006, but the Gilberts did not file suit until September 14, 2009. Thus, the statute of limitations for those violations has long past and the district court was correct in dismissing those claims.

But, it appears that the Gilberts' TILA claim regarding Appellees' refusal to honor their right to rescind was timely filed. The Gilberts sent a letter to GMAC pursuant to 15 U.S.C. § 1635(f) and Regulation Z on April 5, 2009, indicating that they were exercising their right to rescind the mortgage loan. The creditor then had twenty days to respond. *Id.* § 1635(b). The alleged violation of TILA occurred when GMAC sent the April 14, 2009, letter indicating that it would not rescind the loan transaction. To maintain an action for damages pursuant to TILA, the action had to be filed "within one year from the date of the occurrence of the violation." *Id.* § 1640(e). Inasmuch as the Gilberts filed this lawsuit on September 14, 2009, their TILA claim for damages for GMAC's refusal to honor their right to rescind is not time barred.

### III.

Next, the Gilberts challenge the district court's dismissal of their usury claim. Appellees make two arguments as to why the district court did not err. We are convinced by neither.

First, Appellees urge that the Gilberts' usury claim is not ripe for adjudication. According to Appellees, to the extent that the Gilberts might be subject to pay usurious interest, given the manner in which the payment schedule is configured, they have not yet been required to pay the alleged usurious interest rate. The Gilberts counter that because the



payments that they made were interest only, they were paying usurious interest with each payment. As such, according to the Gilberts, their claim is ripe. Construing the Gilberts' allegations as true, as we must at this stage, we accept that this claim is ripe for adjudication.

Second, Appellees maintain that the Gilberts failed to plead a usury claim. According to Appellees, parties have the right to pay any interest rate to which they agree. Therefore, claim Appellees, "to survive a motion to dismiss, the Gilberts would have to allege that they never agreed to the interest rates imposed by the loan documents. On this they are silent." We disagree.

In their complaint, the Gilberts allege that Appellees "charged and collected interest in excess of the agreed rate or limits set forth in Chapter 24 of the North Carolina General Statutes, including without limitation, the charge, collection and imposition of hidden finance charges contained in the erroneous payment schedule set forth in the Truth in [L]ending disclosure statement."

The elements of a usury claim are as follows:

a loan or forbearance of the collection of money,  
an understanding that the money owed will be paid,  
payment or an agreement to pay interest at a rate  
greater than allowed by law, and the lender's corrupt  
intent to receive more in interest than the legal rate  
permits for use of the money loaned.

*Swindell v. Fed. Nat'l Mortg. Ass'n*, 409 S.E.2d 892, 895 (N.C. 1991). "Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown." *Id.* at 895–96 (quoting *Kessing v. Nat'l Mortg.*



*Corp.*, 180 S.E.2d 823, 827 (1971)) (internal quotation marks omitted).

No one disputes that the Gilberts have established the first two elements. We hold that the Gilberts have adequately pled elements three and four as well. Specifically, the Gilberts contend that there was a loan that was to be repaid; pursuant to the terms of the loan, they were charged an agreed upon or stated interest rate; under the repayment schedule for the loan, they were charged a higher interest rate than agreed upon or allowed by Chapter 24 of the North Carolina General Statutes; when they paid a higher interest rate, Appellees collected more than the agreed upon or allowed interest rate; and Appellees charged the higher rate with a corrupt intent. Consequently, they have properly pled a usury claim pursuant to *Swindell*.

Although not argued by the parties or referenced below, on remand, the district court should consider whether North Carolina General Statute Section 24-1.1A(a)(1) ("Where the principal amount is ten thousand dollars (\$10,000) or more the parties may contract for the payment of interest as agreed upon by the parties . . . ."), Section 24-9(a)(3) ("Exempt loan" means a loan in which . . . [t]he loan amount is three hundred thousand (\$300,000) or more . . . ."), and Section 24-9(b) ("A claim or defense of usury is prohibited in an exempt loan transaction.") are applicable.

#### IV.

The Gilberts also urge that the district court erred in granting Appellees' Rule 12(b)(6) motion as to their NCUDTPA cause of action. To establish a prima facie case of unfair and deceptive trade practices, a plaintiff must demonstrate the following: (1) the defendant committed an unfair or deceptive trade practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. *Spartan Leasing v. Pollard*, 400 S.E.2d 476, 482



(N.C. Ct. App. 1991). An act is unfair when it is unethical or unscrupulous, and it is deceptive if it tends to deceive. *Marshall v. Miller*, 276 S.E.2d 397, 403 (N.C. 1981).

In their allegations concerning their NCUDTPA claims, the Gilberts make the following complaints: usury law violations, TILA violations, and "falsely representing to be the owner and holder of [the Gilberts'] note and deed of trust." Thus, they argue the following:

These acts and omissions proximately damaged plaintiffs, are in and affecting commerce, violate public policy, have the capacity to deceive an ordinary consumer, are unscrupulous, immoral, and oppressive, and constitute unfair and/or deceptive trade practices under [North Carolina General Statute] § 75-1.1, thereby entitling plaintiffs to three times their actual damages plus a reasonable attorney's fee pursuant to [North Carolina General Statute] §§ 75-16 and 75-16.1.

Some of the Gilberts' allegations concern the actions of the Appellees, and some concern the actions of the original creditor, who is not party to this lawsuit. And, although some claims in this lawsuit can be assigned, "unfair practice claims pursuant to . . . § 75-1.1 cannot be assigned," *Investors Title Ins. Co. v. Herzig*, 413 S.E.2d 268, 271 (N.C. 1992). Thus, the district court properly dismissed those portions of the claims. "[A] violation of a consumer protection statute may, in some instances, constitute a *per se* violation of the UDTPA[.]" however. *In re Fifth Third Bank, Nat'l Ass'n-Vill. of Penland Litig.*, 719 S.E.2d 171, 176 (N.C. Ct. App. 2011). Inasmuch as we have held that certain of the Gilberts' TILA and usury claims should go forward, and because we are of the opinion that the Gilberts have set forth a sufficient factual basis for these claims, we hold that their unassigned NCUDTPA claims should be allowed to proceed as well.



## V.

The Gilberts also contest the district court's determination that res judicata barred them from raising issues related to the endorsements on the allonge to the note.

As the district court recognized, "[i]ssues that 'the clerk of court decides at a foreclosure hearing as to the validity of the debt and the trustee's right to foreclose are subject to res judicata and cannot be relitigated.'" *Gilbert*, 2010 WL 2696763, at \*4 (quoting *Merrill Lynch Bus. Fin. Servs. Inc. v. Cobb*, No. 5:07-CV-129-D, 2008 WL 6155804, at \*3 (E.D.N.C. Mar. 18, 2008)). Because the superior court affirmed the Clerk's decision that Deutsche could enforce the note, the district court concluded that res judicata barred the Gilberts from relitigating Deutsche's enforcement authority. *Id.*

But, as noted above, on May 3, 2011, the North Carolina Court of Appeals reversed the state trial court's decision that allowed Simpson to proceed with a foreclosure sale, finding that "the record is lacking of competent evidence sufficient to support that [Deutsche] is the owner and holder of Mr. Gilbert's note and deed of trust." *In re Simpson*, 711 S.E.2d at 175. As such, res judicata no longer bars the Gilberts from litigating whether Deutsche has authority to enforce the note.

## VI.

Finally, the Gilberts complain that the district court erred in denying their motion to alter or amend pursuant to Rule 59(e). Because we are reversing and remanding this case to the district court, the argument is moot.

## VII.

In light of the foregoing, we affirm in part, reverse in part and remand for further proceedings.



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GILBERT V. RESIDENTIAL FUNDING LLC

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*AFFIRMED IN PART,  
REVERSED IN PART,  
AND REMANDED*



STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

09 CVS 70  
CODE: COMP: OTHR

REX T. GILBERT, JR. and  
DANIELA L. GILBERT,  
Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS, *As Trustee for*,  
RESIDENTIAL ACCREDIT LOANS, INC.,  
DAVID A. SIMPSON, P.C., Substitute Trustee,  
RESIDENTIAL FUNDING, LLC, and  
GMAC MORTGAGE, LLC,  
Defendants.

**FILED**  
**IME 10:15 Am**

SEP 14 2009

**CLERK SUPERIOR COURT**  
**HYDE COUNTY**  
*Deputy* **CLERK**

**COMPLAINT**

NOW COME the plaintiffs by and through their counsel of record and allege and say as follows:

**JURISDICTION**

This action is instituted pursuant to N.C. Gen. Stat. § 45-21.34 for the purpose of enjoining the foreclosure sale authorized by Order of the Honorable Marvin Blount in Hyde County File 09-SP-09 and raising legal and equitable defenses, including but not limited to, rescission pursuant to rights granted under the federal Truth in Lending Act, material disclosures violations of the federal Truth in Lending Act, unfair and deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1, et. seq., and the charging and collecting of usurious interest in violation of N.C. Gen. Stat. § 24-2, et. seq.

**PARTIES**

1. The plaintiffs are citizens and residents of Hyde County North Carolina.



2. Defendant, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc. Series 2006-QA6 (hereinafter Deutsche) is, upon information and belief, an entity that serves as Trustee for securitized pools of mortgage loans that are secured by North Carolina real property and regularly uses the North Carolina Courts for purposes of foreclosing mortgage loans that it holds as Trustee. Defendant Deutsche purports to be the owner and holder of the Adjustable Rate Note (hereinafter Promissory Note) and Deed of Trust that are the subject of this complaint and has, upon information and belief, instructed the Substitute Trustee of a Deed of Trust signed by plaintiffs, to file the foreclosure action known as 09 SP 09 in the Superior Court of Hyde County, North Carolina.

3. Defendant, David A. Simpson, P.C. (hereinafter Simpson) is a professional corporation organized under the laws of the State of North Carolina which, upon information and belief, contracts with financial services companies to provide Substitute Trustee services for prosecution of foreclosures in North Carolina and, upon information and belief, purports to have been appointed as a Substitute Trustee under the Deed of Trust that secures the mortgage loan that is the subject of this complaint.

4. Defendant Residential Funding, LLC (hereinafter Residential Funding) is, upon information and belief, a limited liability company which purports to be the master servicer for the Note and Deed of Trust which is the subject of this complaint.

5. Defendant, GMAC Mortgage, LLC (hereinafter GMAC) is, upon information and belief, a limited liability company which regularly services loans secured by real property located in North Carolina. GMAC purports to be the current subservicer of the Note and Deed of Trust which is the subject of this complaint.



FACTUAL ALLEGATIONS

6. All paragraphs of this complaint are incorporated herein as if fully set forth.

7. Plaintiffs, Rex T. Gilbert, Jr. and Daniela L. Gilbert, are husband and wife and reside upon a tract of land that is titled in their name as tenants by the entirety on Ocracoke Island, Hyde County, North Carolina.

8. During the late winter or early spring of 2006, plaintiff, Daniela Gilbert, telephoned First Flight Mortgage, LLC office located at 2503 North Croatan Highway in Kill Devil Hills, North Carolina.

9. During the months of March and April of 2006, plaintiff, Daniela L. Gilbert spoke on many occasions with Emily Berry-Belvin, who represented herself to be the loan officer for First Flight Mortgage, LLC who would handle the mortgage loan transaction for plaintiffs.

10. Upon information and belief, Emily Berry-Belvin, was, at all times pertinent to the transactions described in this complaint, the employee or agent of First Flight Mortgage, LLC, with full actual and apparent authority to act for First Flight Mortgage, LLC.

11. During the spring of 2006, plaintiffs were struggling to make the payments on an adjustable rate mortgage loan and wanted to refinance to cash out money until they were able to sell their home and borrow money to build another home on an adjacent parcel of land.



12. Plaintiff, Daniela L. Gilbert, talked with Emily Berry-Belvin and explained that plaintiffs wanted to refinance their mortgage loan with a loan that would allow them to cash out money until they sold their home and built a new lower cost home.

13. Plaintiff, Daniela L. Gilbert, provided Emily Berry-Belvin with copies of plaintiffs' bank statements to show their income.

14. The income documentation provided by plaintiffs does not show monthly income of \$10,950.00 each month.

15. At some point, Emily Berry-Belvin called plaintiffs to advise of the need for an appraisal. After some discussion, Emily Berry Belvin represented to plaintiffs that their home needed to appraise at \$700,000.00 in order for them to get the loan.

16. When plaintiff, Daniela L. Gilbert, offered to contact John W. Hunter, a licensed appraiser who has considerable experience appraising residential properties on Ocracoke, Emily Berry-Belvin advised plaintiff that they needed someone "more aggressive with the numbers."

17. On information and belief, Ms. Berry-Belvin contacted Marco P. Garcia with Appraisal Group Outer Banks, Inc. who conducted, prepared and signed a Uniform Residential Appraisal Report which valued the plaintiff's property at \$700,000.00.

18. Plaintiffs did not receive a copy of aforementioned appraisal under sometime after the loan transaction which is the subject matter of this complaint was completed. The copy received by plaintiffs is inserted into a plastic binder with a green spine which matches the color of the First Flight Mortgage logo and includes a cover sheet with First Flight Mortgage letterhead.



19. When the appraisal came in, Emily Berry-Belvin represented to plaintiffs that they would close before the end of April, 2006.

20. Emily Berry-Belvin told plaintiff, Daniela L. Gilbert, not to make further payments to the lender that currently held plaintiffs' mortgage loan because the refinance loan would be closing during the month of April.

21. In reasonable reliance upon the statements and assurances of Emily Berry-Belvin, that the refinance loan would close during the month of April, plaintiffs followed her instruction and withheld the May 2003 mortgage payment and plaintiffs proceeded to use the money that would otherwise have been used for the May mortgage payment for other necessary household expenses.

22. The mortgage loan finally closed late on the afternoon of May 5, 2006.

23. During the month of May, 2006 and shortly before the May 5, 2006, loan closing, plaintiff, Daniela L. Gilbert, received a telephone call from Emily Berry-Belvin who stated that because the plaintiffs were planning to sell their home, the refinance they would be getting would be an interest only loan. No other option was presented to plaintiffs.

24. Plaintiffs voiced objections to the interest-only loan; however, plaintiffs were reassured by Emily Berry-Belvin that this was the best option for them given their financial situation and she led plaintiffs to believe that they would be able to refinance the terms of the loan in a year or so.

25. On May 5, 2006, plaintiffs traveled to Nags Head to the office of a lawyer for the loan closing.



26. Upon arrival at the lawyer's office, plaintiffs were advised that they would have to wait because the paper work had not arrived.

27. After waiting several hours and having to make calls to Ocracoke to arrange for unplanned after school child care, the plaintiffs were finally ushered into a back office to sign the paper work beginning at approximately 5:50 p.m.

28. Plaintiffs did not meet the lawyer who was supposed to be handling the closing. Instead, plaintiffs met with an assistant who sat across the table from the plaintiffs with a stack of papers marked with stickies indicating where their signatures were needed.

29. The assistant did not review the documents with the plaintiffs nor did she explain the contents or purpose of any of the documents. The assistant hurried plaintiffs through the signing process by showing plaintiffs where to sign and instructing them to sign. Plaintiffs did look at several of the documents but did not have an opportunity to review the full extent of the contents of all of the documents.

30. Once the plaintiffs had signed each of the documents in the place indicated by the assistant, the meeting was over. Plaintiffs did not receive any of the documents or copies of any of the documents after they had completed the signing process.

31. Among other documents, plaintiffs executed a Promissory Note in the amount of \$525,000.00 and a Deed of Trust securing the Promissory Note for the benefit of the original lender, First National Bank of Arizona.

32. The copy of the Promissory Note presented at the foreclosure hearing in the matter 09 SP 09 in Hyde County Superior Court bore an additional page entitled



"Allonge to Note" (hereinafter Allonge) The Allonge purports to meet the requirements of N.C. Gen. Stat. § 25-1-201(21) by showing indorsements, authorized signatures, by the various and multiple entities purporting to assign and transfer the Promissory Note and Deed of Trust from the original lender, First National Bank of Arizona through to present purported holder and owner, defendant Deutsche. (Exhibit 1)

33. The Allonge shows an indorsement by First National Bank of Arizona to First National Bank of Nevada.

34. The Allonge shows an indorsement by Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact wherein it purports to have authority to indorse on behalf of First National Bank of Nevada to Residential Funding Corporation.

35. Plaintiffs have requested documentation to substantiate the authority of Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact to act on behalf of First National Bank of Nevada; no such information has been provided; therefore, on information and belief, there is no underlying documentation to substantiate the indorsement by Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact for First National Bank of Nevada to Residential Funding Corporation.

36. The Allonge shows an indorsement from Residential Funding Corporation to Deutsche Bank Trust Company Americas as Trustee.

37. With respect to Residential Accredit Loans, Inc., the Allonge bears no indorsement to Residential Accredit Loans, Inc. which is the entity which purports to be the owner and holder of the note.



38. The Allonge bears the indorsement "Deutsche Bank Trust Company of Americas Trustee". The indorsement does not state for whom Deutsche Bank is acting as Trustee.

39. The Promissory Note executed by plaintiff provides for interest to be charged at a yearly rate of 7.375% and for the first *84 monthly payments in the amount of \$4,391.32*. (Exhibit 2) This same Promissory Note indicates on its face that there was an interest-only addendum to the note.

40. The interest-only addendum states that it superseded certain sections of the Promissory Note; to wit: *the first 120 payments in the amount of \$3226.57 and the next 240 payments in an amount sufficient to fully amortize the outstanding principal balance of the note over the remaining term of the Note in equal monthly payments*. (Exhibit 3)

41. The federal Truth in Lending disclosure statement provided to plaintiffs at closing disclosed the following:

APR:	Finance charge	Amount Financed	Total of Payments
7.953%	\$943469.57	\$507,473.43	\$1,450,943.00

Payment Schedule:

84 payments @ \$3226.57  
36 payments @ \$3500.00  
239 payments @ \$4391.32  
1 payment @ \$4385.64

(Exhibit 4)



42. The payment schedule disclosed on the Truth in Lending Disclosure Statement does not match the payment schedule set forth in the Promissory Note or the interest only addendum to the Promissory Note.

43. To date, plaintiffs have failed to receive a Truth in Lending Disclosure Statement which accurately discloses the payment schedule for the transaction which is the subject of this Complaint.

44. The three day right to cancel the transaction is extended until plaintiffs receive the Truth in Lending disclosures or the expiration of three years whichever is later.

45. On April 5, 2009, plaintiffs by and through their counsel exercised their extended right to rescind the loan transaction by giving written notice. (Exhibit 5)

46. By letter dated April 24, 2009, Kathy Priore, Associate Counsel for GMACM, advised that it "would not rescind the Loan transaction at this time." (Exhibit 6)

47. The payment schedule set forth on the Truth in Lending Disclosure Statement charges plaintiffs more than \$100,000.00 in hidden finance charges.

48. Beginning in the summer of 2008, plaintiffs attempted to negotiate with defendant GMAC for a loan modification by submitting detailed financial documentation.

49. Plaintiffs were told that they needed to make two consecutive regular mortgage payments before they would be considered for a loan modification.

50. Plaintiffs spent untold hours on hold on the telephone attempting to contact representatives of defendant GMAC sometimes with success but many times without success. Plaintiffs never spoke to the same representative twice.



50. On or about August 27, 2008, plaintiffs received a letter from defendant GMAC returning their last mortgage payment and informing plaintiffs that they had failed to honor the trial period.

51. In a state of near panic, plaintiff telephoned defendant GMAC and after a long wait on hold plaintiff was told that the representative responsible for processing their request for loan modification had been fired for failing to process loan modifications.

52. Plaintiff was assured by a representative of defendant GMAC that he would place a hold on the foreclosure status and work with them to process the loan modification. Plaintiff was subsequently unable to reach this representative again.

53. On or after September 5, 2008, plaintiffs received an overnight envelope from defendant GMAC regarding a loan modification.

54. Plaintiff learned that they had been approved for a loan modification which modified the interest rate to 5.7500% on a new principal balance of \$541,036.08, on a term of 332 months with a maturity date of June 1, 2026.

55. The loan modification also required them to make a lump sum payment of \$8051.40 by October 1, 2008 and begin making the modified payments on November 1, 2008.

56. The loan modification reduced plaintiffs' monthly mortgage payment by 4429.99. Plaintiffs were unable to make the lump sum payment required to qualify for the loan modification.

57. Beginning in October, 2008, plaintiffs attempted by and through counsel to negotiate with defendant GMAC.



58. On October 14, 2008, plaintiffs faxed releases of information authorizing defendant GMAC to discuss their account with counsel.

59. Defendant GMAC advised plaintiffs that it would take up to five days for verification of the release of information to post to plaintiffs account and until such time defendant GMAC was not authorized to speak with counsel.

60. On October 20, 2008, plaintiffs through counsel again attempted without success to speak with representatives of defendant GMAC regarding plaintiffs' account.

61. On November 2, 1008, plaintiffs through counsel wrote to defendant GMAC regarding options for a real loan modification. Plaintiffs did not receive a response to this letter.

62. On November 14, 2008, plaintiffs through counsel spoke with defendant GMAC's representative Jay Graves regarding their account. Plaintiffs were advised that the modification had been denied because of the failure to make the lump sum payment.

63. On January 9, 2009, plaintiffs again through counsel wrote to defendant GMAC regarding a loan modification. Plaintiffs did not receive a response to this letter.

63. On February 10, 2009, plaintiffs again through counsel wrote to defendant GMAC regarding their account.

64. On February 20, 2009, defendant GMAC by letter advised plaintiffs' counsel that until she submitted written permission from the plaintiffs, defendant GMAC could not speak with counsel.

#### CLAIMS FOR RELIEF

#### STATEMENT OF NATURE OF CLAIMS ASSERTED



65. This action is filed, in part, to enjoin the mortgage foreclosure sale ordered in 09 SP 09, Hyde County, on equitable and legal grounds pursuant to N.C. Gen. Stat. §45-21.34. All claims asserted affirmatively by plaintiffs in this action are also asserted, in the alternative, in defense and recoupment against any claim of indebtedness arising from the mortgage loan obligations and transactions that are the subject of this complaint.

**FIRST CLAIM FOR RELIEF**  
**VIOLATIONS OF TRUTH IN LENDING**  
**AGAINST DEFENDANTS DEUTSCHE, RESIDENTIAL FUNDING AND GMAC**

66. All paragraphs of this complaint are incorporated herein as if fully restated.

67. This consumer credit transaction was subject to the Plaintiffs' right of rescission as described by 15 U.S.C. § 1635 and Regulation Z § 226.23 (12 C.F.R. § 226.23).

68. Defendants Deutsche, Residential Funding and GMAC as purported assignees of First National Bank of Arizona and servicers and subservicers of the purported holder of the Promissory Note are liable to plaintiffs for violations 15 U.S.C. § 1635(a) and Regulation Z § 226.23(b) for failure to timely deliver to the Plaintiffs two copies of the notice of the right to rescind which clearly and conspicuously disclosed the date the rescission period expired.

69. Defendants Deutsche, Residential Funding and GMAC as purported assignees of First National Bank of Arizona and servicers and subservicers of the purported holder of the Promissory Note are liable to plaintiffs for failing to deliver all "material" disclosures required by the Act and Regulation Z, including the following:

a. By failing to properly and accurately disclose the "amount financed," using that term in violation of Regulation Z § 226.18(b) and 15 U.S.C. §1638(a)(2)(A).

b. By failing to clearly and accurately disclose the "finance charge," using that term, in violation of Regulation Z §§ 226.4 and 226.18(d) and 15 U.S.C. §1638(a)(3).



c. By failing to clearly and accurately disclose the "annual percentage rate," using that term, in violation of Regulation Z § 226.18(e) and 15 U.S.C. § 1638(a)(4).

d. By failing to properly disclose the number, amounts, and timing of payments scheduled to repay the obligation, in violation of Regulation Z § 226.18(g) and 15 U.S.C. § 1638(a)(6).

e. By failing to clearly and accurately disclose the "total of payments," using that term, in violation of Regulation Z § 226.18(h) and 15 U.S.C. § 1638(a)(5).33.

70. These material disclosure violations are apparent from the face of the disclosure statement and other documents assigned pursuant to the requirements of 15 U.S.C. § 1641(a).

71. Plaintiffs have a continuing right to rescind the transaction until the third business day after receiving both the notice described in paragraph 50 and all "material" disclosures described in paragraph 69, pursuant to 15 U.S.C. § 1635(a) and Regulation Z § 226.23(a)(3), up to three years after consummation of the transaction.

72. On April 5, 2009, Plaintiffs by and through counsel rescinded the transaction by sending to a notice of rescission addressed to "Holder of Loan # , c/o Ms. Lauren S. Thurmond, Kellam & Pettit, P.A. , 2701 Coltsgate Road, Suite 300, Charlotte, North Carolina 28211.

73. Counsel for defendants forwarded the plaintiffs' letter of rescission to GMAC.

74. More than 20 calendar days have passed since the Defendants received copies of the Plaintiff's notice of rescission.

75. Defendants have failed to take any action necessary or appropriate to reflect the termination of the security interest created under this transaction as required by 15 U.S.C. § 1635(b) and Regulation Z § 226.23(d)(2).



76. Defendants have failed to return to plaintiffs any money or property given by the plaintiffs to anyone, including the defendants, as required by 15 U.S.C. §1635(b) and Regulation Z § 226.23(d)(2).

77. As a result of the aforesaid violations of the Act and Regulation Z, pursuant to 15 U.S.C. §§ 1635(a), 1640(a), and 1641(c), defendants are liable to plaintiffs for:

- a. Rescission of this transaction.
- b. Termination of any security interest in Plaintiff's property created under the transaction.
- c. Return of any money or property given by the Plaintiff to anyone, including the Defendant, in connection with this transaction.
- d. Statutory damages of \$2000 for the disclosure violations.
- e. Statutory damages of \$2000 for Defendants' failure to respond properly to Plaintiff's rescission notice.
- f. Forfeiture of return of loan proceeds.
- g. Actual damages in an amount to be determined at trial.
- h. A reasonable attorney fee.

SECOND CLAIM FOR RELIEF  
USURY

78. All paragraphs of this complaint are incorporated herein as if fully restated.

79. With willful and corrupt intent to charge and collect a greater rate of interest than allowed by law, defendants charged and collected interest in excess of the agreed rate or limits set forth in Chapter 24 of the North Carolina General Statutes, including without limitation, the charge, collection and imposition of hidden finance charges contained in the erroneous payment schedule set forth in the Truth in lending disclosure statement.

80. These acts and practices entitle plaintiffs to the remedies set out in N.C.G.S. § 24-2 *et seq.*, and defendant, Deutsche, as purported holder of the loan and by reason of its joint venture relationship with defendants, Residential Funding and



GMAC is jointly and severally liable with defendants, Residential Funding and GMAC, for all damages pursuant to this Claim.

**THIRD CLAIM FOR RELIEF**  
**UNFAIR TRADE PRACTICES PURSUANT TO N.C. GEN. STAT. 75-1.1**

81. All paragraphs of this complaint are incorporated herein as if fully restated.

82. Defendants have engaged in unfair methods of competition in or affecting commerce or unfair or deceptive acts or practices in or affecting commerce in at least but not limited to the following:

- a. disclosing, charging and collecting usurious rates of interest;
- b. failing to make material disclosures pursuant to the requirements of the federal Truth in Lending Act;
- c. failing to take affirmative steps to cancel the plaintiffs' Deed of Trust upon their notice of rescission;
- d. falsely representing to be the owner and holder of plaintiffs' note and deed of trust;

83. These acts and omissions proximately damaged plaintiffs, are in and affecting commerce, violate public policy, have the capacity to deceive an ordinary consumer, are unscrupulous, immoral, and oppressive, and constitute unfair and/or deceptive trade practices under N.C.G.S. § 75-1.1, thereby entitling plaintiffs to three times their actual damages plus a reasonable attorney's fee pursuant to N.C.G.S. §§ 75-16 and 75-16.1.

**FOURTH CLAIM FOR RELIEF**  
**VIOLATIONS OF NORTH CAROLINA'S PROHIBITED ACTS BY DEBT COLLECTORS**  
**PURSUANT TO N.C. GEN. STAT. § 75-50 ET. SEQ.**

84. All paragraphs of this complaint are incorporated herein as if fully restated.



85. Plaintiffs are consumers within the meaning of N.C. Gen. Stat. § 75-50 et seq.

86. Defendants are debt collectors within the meaning of N.C. Gen. Stat. § 75-50 et. seq.

87. Defendants have attempted to collect a debt within the meaning of N.C. Gen. Stat. § 75-50(2).

88. Defendants have engaged in acts of debt collection in violation of N.C. Gen. Stat. § 75-50 et. seq. in at least but not limited to the following:

- a. communicating with plaintiffs after the defendants had been notified by the plaintiff's attorney that she represents said plaintiffs;
- b. falsely representing the character, extent, or amount of debt against a consumer pursuant to N.C. Gen. Stat. § 75-54(4) to wit: all attempts to collect money from plaintiffs after plaintiffs forwarded their notice of rescission to the noteholder;
- c. falsely representing to be owner and holder of the plaintiffs' Promissory Note;
- d. attempting to foreclose on plaintiffs' property without legal authority.

89. Defendants are liable to plaintiffs for actual damages and a statutory penalty of \$2000.00 for each violation proved at trial and reasonable attorney's fees.

**FIFTH CLAIM FOR RELIEF  
BREACH OF CONTRACT**

90. All paragraphs of this complaint are incorporated herein as if fully restated.

91. On or about May 5, 2006, plaintiff executed a Promissory Note in favor of First National Bank of Arizona.



92. The federal Truth in Lending disclosure statement provided to plaintiffs at closing disclosed the following payment schedule:

84 payments @ \$3226.57  
36 payments @ \$3500.00  
239 payments @ \$4391.32  
1 payment @ \$4385.64

93. The payment schedule set forth in paragraph 74 is a breach of the contract between plaintiff and the original lender.

94. Plaintiffs are entitled to actual damages and reasonable attorney's fees.

#### SIXTH CLAIM FOR RELIEF

95. All paragraphs of this complaint are incorporated herein as if fully restated.

96. On or about May 5, 2006, plaintiff executed a Promissory Note in favor of First National Bank of Arizona.

97. Defendant, Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc. purports to be the owner and holder of the Promissory Note executed by plaintiff to First National Bank of Arizona by and through various indorsements.

98. Under N.C. Gen. Stat. § 25-3-301, the holder of a negotiable instrument may enforce payment in his own name.

99. N. C. Gen. Stat. § 25-1-201(21) defines a holder of an instrument as one who is in possession of an instrument "drawn, issued, or indorsed to him or to his order or to bearer or in blank.

100. Where a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly indorsed and delivered.



101. Mere possession of a note payable to order does not suffice to prove ownership or holder status. . Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

102. The Allonge under and by which Defendant Deutsche claims to hold is defective in at least the following:

a. on information and belief, the indorsement by Deutsche Bank National Trust Company, FKA Bankers Trust Company of California, N.A. as Custodian as Attorney in Fact on behalf of First National Bank of Nevada is not duly authorized;

b. the indorsement to Defendant Deutsche is in its representative capacity as trustee not to Defendant Deutsche in its own name. No principal's name appears in the indorsement.

103. Defendant Deutsche is without authority and capacity to enforce the Promissory Note executed by plaintiff to First National Bank of Arizona.

104. The Court should strike the Order allowing foreclosure by sale entered by Judge Blount as void.

105. Defendants are liable to plaintiffs for an amount to be proven at trial.

**PLAINTIFFS' FIRST MOTION FOR INJUNCTIVE RELIEF AGAINST DEFENDANTS  
TO PRESERVE THE STATUS QUO AND TO PREVENT DELAYING TACTICS BY  
PROHIBITING THE ASSIGNMENT OF THE MORTGAGE OR SERVICING  
RIGHTS DURING THE COURSE OF THE LITIGATION**

106. All paragraphs of this complaint are incorporated herein as if fully restated.

107. Plaintiffs, pursuant to Rule 65(b) of the North Carolina Rules of Civil Procedure, move this Court for an Order granting a Preliminary Injunction, enjoining these defendants from conveying or assigning any interest in the mortgage loan that is the subject of this litigation until and unless otherwise allowed by Court Order.



108. As grounds for said Motion, plaintiffs reallege and incorporate herein by reference the facts of this verified complaint and state additionally that they will suffer immediate and irreparable harm if said defendants undertake to delay these proceedings by forcing addition or joinder of parties who may subsequently obtain an interest in plaintiffs' loan. The prospect of prolonged delay by virtue of sale or assignment of interests in this loan is not without precedent by similarly situated lender-defendants and would cause great harm to the plaintiffs.

109. Plaintiffs show the court that the relief requested is for the purpose of preserving the status quo and that the burden imposed upon the defendants is reasonable and necessary for purposes of preserving the status quo and that the burden is far less than would be suffered by the plaintiffs if the status quo is not maintained during the course of the litigation.

110. Plaintiffs respectfully request that the Court accept this verified complaint as their affidavit for purposes of this Motion for Preliminary Injunction.

**PLAINTIFFS' SECOND MOTION FOR INJUNCTIVE RELIEF AGAINST**  
**DEFENDANTS**  
**TO PRESERVE THE STATUS QUO AND TO RESTRAIN A FORECLOSURE**  
**SALE DURING THE COURSE OF THIS LITIGATION, WHICH WOULD**  
**OTHERWISE CAUSE IRREPARABLE HARM TO PLAINTIFFS.**

111. All paragraphs of this complaint are incorporated herein as if fully restated.

112. Plaintiffs, through counsel and pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, respectfully move this Court for a Temporary Restraining Order prohibiting defendants from proceeding toward the foreclosure sale of plaintiffs' home and, in support of this motion, show the following: (i) plaintiffs have shown



through their Complaint and Affidavit, and will show at the hearing of this Motion, claims which have a substantial likelihood of success on the merits; (ii) that plaintiffs will suffer immediate and irreparable harm by virtue of losing title to their home through foreclosure sale before the adverse parties or their counsel can be heard in opposition to this Motion; (iii) that the potential injury to the plaintiffs is of such a nature that compensation alone will not make plaintiffs whole; (iii) that the restraint ordered imposes no undue burden or risk of harm to defendants; (iv) that balancing the risk of harm between the parties favors injunctive relief in favor of plaintiffs; (v) that time is of the essence, and that the bond, if applicable, will adequately protect defendants from any reasonable risk of harm by the restraint ordered while the underlying claims determining the rights of the parties are decided.

113. Plaintiffs' counsel undersigned certifies to the Court the efforts that have been made to give notice of this Motion to the adverse parties and the reasons supporting the claim that notice should not be required as follows:

114. Wherefore plaintiffs respectfully request that a Temporary Restraining Order be entered by the Court prohibiting the defendants from pursuing further proceedings toward the foreclosure sale of plaintiffs' home or otherwise ordering relief as the Court determines appropriate.

#### **REQUEST FOR RELIEF**

WHEREFORE, plaintiffs respectfully request that this Court:

1. Assume jurisdiction of this case;
2. Declare the security interest in Plaintiff's home void;
3. Rescind the transaction of May 5, 2006;



4. Order defendants to take all action necessary to terminate any security interest in plaintiffs' property created under the transaction and that the Court declare all such security interests void, including but not limited to the mortgage related to the transaction of May 5, 2006;

5. Order the return to the plaintiffs of any money or property given by the plaintiffs to anyone, including the defendants, in connection with the transaction;

6. Enjoin defendants during the pendency of this action, and permanently thereafter, from instituting, prosecuting, or maintaining foreclosure proceedings on the plaintiffs' property, from recording any deeds or mortgages regarding the property or from otherwise taking any steps to deprive plaintiffs of ownership of that property;

7. Award the plaintiffs statutory damages for the disclosure violations, in the amount of twice the finance charge in connection with this transaction, but not less than \$200 or more than \$2000 as provided under 15 U.S.C. § 1640(a);

8. Award the plaintiffs statutory damages for defendants' failure to respond properly to the plaintiffs' rescission notice, in the amount of twice the finance charge in connection with this transaction, but not less than \$200 or more than \$2000 as provided under 15 U.S.C. § 1640(a);

9. Order that, because the defendants failed to respond to the plaintiffs' notice of rescission, plaintiffs have no duty to tender, but in the alternative, if tender is required, determine the amount of the tender obligation in light of all of the plaintiffs' claims, and order the defendants to accept tender on reasonable terms and over a reasonable period of time;

10. Award actual damages in an amount to be established at trial;



11. Award the plaintiff costs and a reasonable attorney fee as provided under 15 U.S.C. § 1640(a);
12. Award treble damages pursuant to N.C. Gen. Stat. §75-16;
13. Order a forfeiture of all interest under the loan transaction;
14. Award twice the amount of usurious interest pursuant to N.C. Gen. Stat. § 24-2, et. seq.;
15. Grant plaintiffs injunctive relief as requested above;
16. Strike the Order of allowing the foreclosure sale;
17. Award such other and further relief as the Court deems just and proper.

This the 14<sup>th</sup> day of September 2009.



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Katherine S. Parker-Lowe  
Attorney for Plaintiffs  
NC Bar # 13318  
35 Miss Elecia Lane, Suite 101  
Post Office Box 730  
Ocracoke, North Carolina 27960  
252-928-1000  
252-928-3037

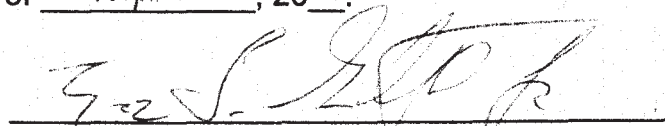


VERIFICATION

I, Rex T. Gilbert, Jr., being duly sworn, depose and say the following:


That the contents of the foregoing instrument are true to my own knowledge except matters stated on information and belief and as to those matters I believe them to be true.

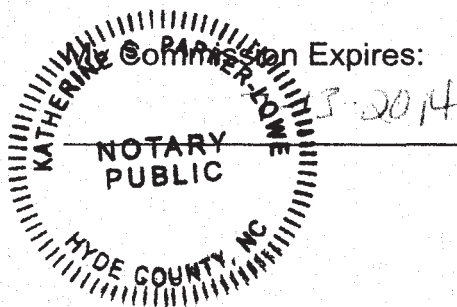
This the 12<sup>th</sup> day of Sept, 2009.

  
Rex T. Gilbert, Jr.

Sworn and subscribed to before me

this 12<sup>th</sup> day of Sept, 2009.

  
Notary Public





STATE OF NORTH CAROLINA  
COUNTY OF HYDE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 70

REX T. GILBERT, JR. and  
DANIELA L. GILBERT,  
Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY  
AMERICAS, *As Trustee for*,  
RESIDENTIAL ACCREDIT LOANS, INC.,  
DAVID A. SIMPSON, P.C., Substitute Trustee,  
RESIDENTIAL FUNDING, LLC, and  
GMAC MORTGAGE, LLC,  
Defendants.

FILED  
JUNE 10:15-AM  
SEP 14 2013  
CLERK SUPERIOR COURT  
HYDE COUNTY  
Deputy Clerk

AFFIDAVIT OF KEITH PARKER-LOWE

I, Keith Parker-Lowe, being first duly sworn, aver and say as follows:

1. I am President and CEO of KPL, Inc. a software development company and system integrator for county governments in the mid-Atlantic located and doing business in Ocracoke, North Carolina.

2. I completed training for the business planning department of AETNA Life and Casualty. This course of study included calculations, financial yields, actuarial tables, compound interest tables, statistics, and financial plotting and modeling.

3. I completed training for and obtained a Securities and Exchange Commission Brokers License

4. I am a licensed Realtor in North Carolina. The course study included not only the study of financial calculations for mortgage loans and installment loans but the



actual preparation of the financial calculations required for making these loans and making accurate disclosures to consumers on these loans.

5. I completed Canon's computer programming school in 1973.

6. I wrote the financial programs and several operating manuals for Sharp Electronics on installment loan calculations and amortization schedules.

7. I created computer programs for installment loan calculations to meet the compliance requirements of Truth in Lending for various banks and lending institutions including The Federal Land Bank, PCA and Southern National Bank and Bank of Montgomery, Bank of Raeford and NCNB.

8. I created computer programs to calculate installment loans, amortization schedules, mortgage loans, APR's, and special compound interest calculations for Canon, Sharp and the Federal Reserve.

9. I have created and used various programs to review and check the finance charges against the stated APR, terms, interest, payments and repayment schedule.

10. I worked closely with the Federal Reserve to implement the Federal Truth in Lending Act and Regulation Z to assist many banks in meeting compliance requirements.

11. Over the last several years I have gained experience in drafting and understanding compliance issues for profit sharing and various investment vehicles. This experience has proven invaluable in checking and verifying financial accounts of all types.



12. I previously testified on behalf of Ms. Parker-Lowe in Irene Britt v. Thomas Jones, 123 N.CApp. 108, 472 S.E.2d 199 (1996). This case was originally filed in Hertford County, North Carolina.

13. Based upon my testimony, the Court of Appeals upheld the application of monthly payments to interest first and principal second.

14. Since February 1990, I have reviewed numerous loan agreements, promissory notes, schedules of payments on notes, mortgages, Truth in Lending Disclosure Statements (TIL), and related documents related to actions pending in the North Carolina trial courts and before the U.S. Bankruptcy Court for the Eastern District of North Carolina.

15. I have reviewed ledgers, amortization schedules, repayment schedules, deeds, deeds of trust, land surveys, paper documents, and electronic records for compliance with Truth in Lending and the state usury laws.

16. At Ms. Parker-Lowe's request, I have familiarized myself with the Gilberts' promissory note, interest only addendum to the promissory note and the federal Truth in Lending disclosure statement.

17. At Ms. Parker-Lowe's request, I compared the payment schedules set forth in the promissory note, the addendum to the promissory note and the one set forth in the federal Truth in Lending disclosure statement.

18. The payment schedule set forth in the Truth in Lending disclosure statement does not match either the promissory note or the interest only addendum to the promissory note.



19. After reviewing the documents and determining that the TIL payment schedule did not match either the promissory note or the interest only addendum to the promissory note, I examined the other Truth in Lending mandated disclosures and calculated the APR.

20. The APR using the information disclosed in the TIL results in an APR of 9% not the 7.953% as disclosed to the Gilberts.

21. The Gilberts could have had a repayment schedule with 240 equal successive installments after the interest only period of approximately \$4189.33. The APR would have been incorrect in this case also.

22. The Truth in Lending disclosure statement payment schedule results in an additional \$100,000.00+ interest.

23. In the Interest-Only Addendum to the Gilbert promissory note, Loan 5300000843, in paragraph 4.(C), the Addendum states: After the end of the Interest-only Period, my payment amount will not be reduced due to voluntary prepayments. This statement results in a contradiction: voluntary prepayments after the interest only period will either not be allowed or will not reduce the amount of principal. In my opinion, this is contrary to existing law.

24. Whereas in the Fannie Mae Uniform Instrument note allows for voluntary prepayment by stating that the maturity date will be accelerated as follows: "However, if the partial Prepayment is made during the period when my monthly payments consist only of interest, the amount of the monthly payment will decrease for the remainder of the term when my payments consist only of interest as well as during the time that my payments consist of principal and interest. If the partial Prepayment is made during the



period when my payments consist of principal and interest, the amount of my monthly payment will not decrease; however, the principal and interest required under this Note will be paid prior to the Maturity Date.

This the 15<sup>th</sup> day of September 2009.

Keith Parker-Lowe

Hyde County, North Carolina

Sworn to and subscribed before me this day by Keith Parker-Lowe.

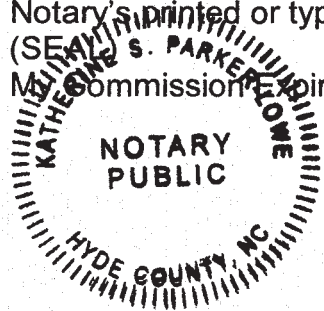
Date: 9/13/2009

Keith Parker-Lowe

Notary Public Signature

Notary's printed or typed name: Katherine S Parker-Lowe

(SEAL) S. PARKER LOWE  
My Commission Expires: 7-15-2014







1855 W. Alameda Drive  
Tempe AZ 85282  
Office (480) 224-8321 Fax 480-224-8522

ALLONGE TO NOTE

LOAN NUMBER: 5500000843  
BORROWER: Gilbert JR  
IN THE AMOUNT OF: \$525,000.00

PAY TO THE ORDER OF:

First National Bank of  
Nevada

WITHOUT RECOURSE BY:

AMY HAWKINS, ASSISTANT VICE PRESIDENT  
FIRST NATIONAL BANK OF ARIZONA

Pay to The order Of  
**RESIDENTIAL FUNDING CORPORATION**

Without Recourse  
First National Bank of Nevada

By   
Deutsche Bank National Trust  
Company, f/k/a Bankers Trust  
Company of California, N. A.  
as Custodian as Attorney in  
Fact

Michael Corcoran  
Vice President

PAY TO THE ORDER OF  
Deutsche Bank Trust Company Americas as Trustee  
WITHOUT RECOURSE  
Residential Funding Corporation

BY   
Judy Faber, Vice President

P Ex 1



## ADJUSTABLE RATE NOTE

(LIBOR Six-Month Index (As Published In *The Wall Street Journal*) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

May 5, 2006  
[Date]

MCLEAN  
[City]

VA  
[State]

134 West End Road, Ocracoke, NC 27960  
[Property Address]

### 1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$ 525,000.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is **First National Bank of Arizona**

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

### 2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of **7.375 %**. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

### 3. PAYMENTS

#### (A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payments on the first day of each month beginning on **July 1, 2006**

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on **June 1, 2036**, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at **P.O. BOX 62768, PHOENIX, AZ 85085-2768**

or at a different place if required by the Note Holder.

#### (B) Amount of My Initial Monthly Payments See Attached Interest-Only Addendum here to and made a part here of.

Each of my initial monthly payments will be in the amount of U.S. \$ **4,391.32**. This amount may change.

#### (C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 of this Note.

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MULTISTATE ADJUSTABLE RATE NOTE - LIBOR SIX-MONTH INDEX (AS PUBLISHED IN *THE WALL STREET JOURNAL*) -  
Single Family - Fannie Mae UNIFORM INSTRUMENT

VMP-838N (0210)

Form 3520 1/01

VMP MORTGAGE FORMS - (800)521-7291



**(A) Change Dates**

The interest rate I will pay may change on the first day of June, 2013, and on that day every 6th month thereafter. Each date on which my interest rate could change is called a "Change Date."

**(B) The Index**

Beginning with the first Change Date, my interest rate will be based on an Index. The "Index" is the average of interbank offered rates for six month U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the first business day of the month immediately preceding the month in which the Change Date occurs is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

**(C) Calculation of Changes**

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage points ( 2.750 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

**(D) Limits on Interest Rate Changes**

The interest rate I am required to pay at the first Change Date will not be greater than 13.375 % or less than 2.750 %. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than one percentage point(s) ( 1.000 %) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 13.375 %, OR LESS THAN 2.750 %.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes**

The Note Holder will deliver or mail to me a notice of any changes in my interest rate and the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

**5. BORROWER'S RIGHT TO PREPAY**

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

**6. LOAN CHARGES**

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

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**(A) Late Charges for Overdue Payments**

If the Note Holder has not received the full amount of any monthly payment by the end of **fifteen** calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be **4.000 %** of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

**(B) Default**

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

**(C) Notice of Default**

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

**(D) No Waiver By Note Holder**

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

**(E) Payment of Note Holder's Costs and Expenses**

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

**8. GIVING OF NOTICES**

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

**9. OBLIGATIONS OF PERSONS UNDER THIS NOTE**

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

**10. WAIVERS**

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

**11. UNIFORM SECURED NOTE**

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

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Transfer of the Property or a Beneficial Interest of Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

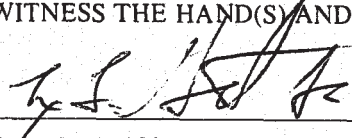
If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

CAUTION-IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

	(Seal)	_____ (Seal)
Rex T. Gilbert, JR	-Borrower	-Borrower
_____	(Seal)	_____ (Seal)
	-Borrower	-Borrower
_____	(Seal)	_____ (Seal)
	-Borrower	-Borrower
_____	(Seal)	_____ (Seal)
	-Borrower	-Borrower

[Sign Original Only]

0843



Loan Number: 0843

Property Address: 134 West End Road, Ocracoke, NC 27960

**HIS ADDENDUM** is made this 5th day of May, 2006, and is incorporated into and intended to form a part of the Adjustable Rate Note (the "Note") dated the same date as this Addendum executed by the undersigned and payable to First National Bank of Arizona (the "Lender").

**THIS ADDENDUM** supersedes Sections 3(A), 3(B), 4(C) and 7(A) of the Note. None of the other provisions of the Note are changed by this addendum.

### 3. PAYMENTS

#### (A) Time and Place of Payments

I will pay interest by making payments every month for the first 120 payments (the "Interest-Only Period") in the amount sufficient to pay interest as it accrues. I will pay principal and interest by making payments every month thereafter for the next 240 payments in an amount sufficient to fully amortize the outstanding principal balance of the Note at the end of the Interest-Only Period over the remaining term of the Note in equal monthly payments.

I will make my monthly payments on the first day of each month beginning on July 1, 2006. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. If, on June 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my payments at 1165 West Alameda Drive, Tempe, AZ 85282 or at a different place if required by the Note Holder.

#### (B) Amount of My Initial Monthly Payments

Each of my initial monthly payments will be in the amount of U.S. \$3,226.57. This payment amount is based on the original principal balance of the Note. This payment amount may change.

### 4. INTEREST RATE AND MONTHLY PAYMENT CHANGES

#### (C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding two and three-quarters percentage point(s) (2.750%) to the Current Index for such Change Date. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D), this rounded amount will be my new interest rate until the next Change Date.

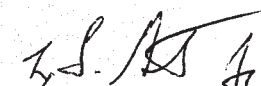
During the Interest-Only Period, the Note Holder will then determine the amount of the monthly payment that would be sufficient to repay accrued interest. This will be the amount of my monthly payment until the earlier of the next Change Date or the end of the Interest-Only Period unless I make a voluntary prepayment of principal during such period. If I make a voluntary prepayment of principal during the Interest-Only Period, my payment amount for subsequent payments will be reduced to the amount necessary to pay interest at the then current interest rate on the lower principal balance. At the end of the Interest-Only Period and on each Change Date thereafter, the Note Holder will determine the amount of the monthly payment that would be sufficient to repay in full the unpaid principal that I am expected to owe at the end of the Interest-Only Period or Change Date, as applicable, in equal monthly payments over the remaining term of the Note. The result of this calculation will be the new amount of my monthly payment. After the end of the Interest-Only Period, my payment amount will not be reduced due to voluntary prepayments.

### 7. BORROWER'S FAILURE TO PAY AS REQUIRED

#### (A) A Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000% of my overdue payment of interest during the interest-only period, 4.000% of my overdue payment of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

Dated: 5/5/06



Rex T. Gilbert, JR



**TRUTH-IN-LENDING DISCLOSURE STATEMENT**

(THIS IS NEITHER A CONTRACT NOR A COMMITMENT TO LEND)

LENDER OR LENDER'S AGENT:

First National Bank of Arizona  
1760 Old Meadow Road  
Mc Lean, VA 22102

☐ Preliminary ☒ Final

DATE: 05/05/2006

LOAN NO.: 0843

Type of Loan: ARM

BORROWERS:

ADDRESS:

CITY/STATE/ZIP:

PROPERTY: 134 West End Road Ocracoke NC 27960

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit as a yearly rate	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled
7.953 %	\$ 943,469.57	\$ 507,473.43	\$ 1,450,943.00

**PAYMENT SCHEDULE:**

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING	NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	PAYMENTS ARE DUE MONTHLY BEGINNING
84	\$3,226.57	07/01/2006			
36	\$3,500.00	07/01/2013			
239	\$4,391.32	07/01/2016			
1	\$4,385.64	06/01/2036			

DEMAND FEATURE: ☒ This loan does not have a Demand Feature. ☐ This loan has a Demand Feature as follows.

VARIABLE RATE FEATURE:



OCRACOKE, NORTH CAROLINA 27960

MAILING ADDRESS  
POST OFFICE BOX 730  
OCRACOKE, NC 27960  
E-MAIL: katherine@parker-lowe.net

TELEPHONE  
(252) 928-1000  
FACSIMILE  
(252) 928-3037

April 5, 2009

Holder of Loan # [REDACTED] 2713  
c/o Ms. Lauren S. Thurmond  
Kellam & Pettit, P.A.  
2701 Coltsgate Road  
Suite 300  
Charlotte, North Carolina 28211

Re: In the Matter of the Foreclosure....Gilbert  
Hyde County File 09-SP-9  
Rex T. Gilbert, Jr.  
134 West End Road  
Post Office Box 754  
Ocracoke, North Carolina 27960

Dear Ms. Thurmond:

As you are aware, I represent Mr. Gilbert concerning the loan transaction which he entered into with First National Bank of Arizona on May 5, 2006. I have been authorized by my clients to rescind this transaction and hereby exercise that right pursuant to the Federal Truth in Lending Act, 15 U.S.C. § 1635, Regulation Z § 226.23.

The disclosure statement failed to provide all the required material disclosures correctly, including, but not limited to:

- (a) The disclosed payment schedule does not match the note;
- (b) The stated APR is more than one-eighth of one-percent off;
- (c) The total of payments is not correct;
- (d) The total of payments results in a higher APR than the disclosed APR
- (e) The disclosures do not match the note or the addendum to the note.

The security interest is void upon our rescission. See 15 U.S.C. § 1635; Regulation Z § 226.23. Pursuant to the Regulation, you have twenty days after receipt of this notice of rescission to return to my client all monies paid and to take action necessary or appropriate to reflect termination of the security interest.

We are prepared to discuss a tender obligation, should it arise, and satisfactory ways in which my client may meet this obligation. Please be advised that if you do not cancel

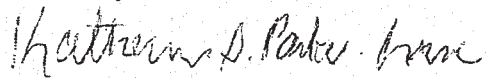
PEX 8



the security interest and return all consideration paid by my client within 20 days of receipt of this letter, you will be responsible for actual and statutory damages pursuant to 15 U.S.C. § 1640(a).

Please send me a copy of my client's payment history and other documents showing the loan disbursements, loan charges, payments made, and current principal balance due.

Sincerely,



Katherine S. Parker-Lowe

KPL/mpc

cc: Mr. and Mrs. Rex T. Gilbert, Jr.



**GMAC ResCap**

April 24, 2009

Katherine Parker-Lowe  
Attorney at Law  
2 Beach Lane  
Ocracoke, NC 27960

Re: Rex Gilbert, Jr.  
Loan number # [REDACTED] 2713 ("Loan")

Dear Ms. Parker-Lowe:

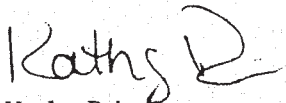
We are writing in response to your correspondence to GMAC Mortgage, LLC requesting rescission of the loan transaction your client entered into with First National Bank of Arizona on May 5, 2006.

We have reviewed your client's loan file and find no basis to conclude that there were any material disclosure errors that would give rise to an extended right of rescission.

Consequently, we will not rescind the Loan transaction at this time.

If you have any documents or further information that sets forth the basis of the demand, please contact me at the address below.

Sincerely,



Kathy Priore  
Associate Counsel

cc: Lauren Thurmond, Kellam & Pettit, PA

PEX 6



LENDER: First National Bank of Arizona

Pg 306 of 317

DATE 5/5/06

LOAN NO. 0843

TYPE Conventional

BORROWERS/OWNERS Rex T. Gilbert, JR

ADDRESS 134 West End Road  
 CITY/STATE/ZIP Ocracoke, NC 27960  
 PROPERTY 134 West End Road, Ocracoke, NC 27960

**YOUR RIGHT TO CANCEL**

You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

- (1) The date of the transaction, which is  
 or  
 (2) The date you received your Truth In Lending disclosures;  
 or  
 (3) The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

**HOW TO CANCEL**

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

First National Bank of Arizona

MS AZ-4003-078

1665 W. Alameda Drive

Tempe, AZ 85282-3200

Or Fax to: (602) 636-7096

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

**I WISH TO CANCEL**

CONSUMER'S SIGNATURE

DATE

Each of the borrowers/owners in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective as to all borrowers/owners.

The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL

X Rex T. Gilbert, JR 5/5/06 X  
 BORROWER/OWNER Rex T. Gilbert, JR DATE BORROWER/OWNER DATE

X Daniela L. Gilbert 5/5/06 X  
 BORROWER/OWNER Daniela L. Gilbert DATE BORROWER/OWNER DATE

**CONFIRMATION CERTIFICATE****DO NOT SIGN UNTIL THREE BUSINESS DAYS HAVE ELAPSED**

Three business days have elapsed since the undersigned have received two copies of this document. Each of the undersigned hereby certify and warrant that they have not exercised any right which they may have to rescind the transaction, that they do not desire to do so, and that they ratify and confirm the transaction in all respects.

BORROWER/OWNER Rex T. Gilbert, JR DATE BORROWER/OWNER DATE

BORROWER/OWNER Daniela L. Gilbert DATE BORROWER/OWNER DATE

0843

VMP -66 0305 01

VMP Mortgage Solutions 1-800-521-7291

10/00

PEX 17



**EXHIBIT 4**



B 10 Modified (Official Form 10) (12/11)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK			PROOF OF CLAIM
Name of Debtor: <u>EMAC Mortgage LLC / Residential Acordit Uans</u>		Case Number: <u>12-12032</u>	
NOTE: This form should not be used to make a claim for an administrative expense (other than a claim asserted under 11 U.S.C. § 503(b)(9)) arising after the commencement of the case. A "request" for payment of an administrative expense (other than a claim asserted under 11 U.S.C. § 503(b)(9)) may be filed pursuant to 11 U.S.C. § 503.			
Name of Creditor (the person or other entity to whom the debtor owes money or property): <b>KATHERINE S. PARKER-LOWE - ATTORNEY AT LAW</b>			<input type="checkbox"/> Check this box if this claim amends a previously filed claim.  <b>Court Claim Number:</b> _____ (If known)  <b>Filed on:</b> _____  <input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.  <b>5. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.</b>  <input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. §507 (a)(4). <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5). <input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507 (a)(7). <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8). <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(____).  <b>Amount entitled to priority:</b> \$ _____  * Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
Name and address where notices should be sent: <b>NameID: 10854274</b> <b>KATHERINE S. PARKER-LOWE - ATTORNEY AT LAW</b> <b>GILBERT - IN THE MATTER OF THE FORECLOSURE BY DAVID A SIMPSON, P C, SUBSTITUTE TRUSTEE, OF DEED OF TRUST EXECUTED BY RE ET AL</b> <b>P.O. Box 730</b> <b>Ocracoke, NC 27960</b>			
Telephone number: <u>252-928-1000</u> email: <u>katherine@ocracoke.law.com</u>			
Name and address where payment should be sent (if different from above):			
Telephone number: _____ email: _____			
<b>1. Amount of Claim as of Date Case Filed: \$</b> <u>83,181.11</u> If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.			
<b>2. Basis for Claim:</b> <u>Attorneys fees for Name ID 10987299</u> (See instruction #2)			
<b>3. Last four digits of any number by which creditor identifies debtor:</b>  <u>5107</u>	<b>3a. Debtor may have scheduled account as:</b> _____ (See instruction #3a)	<b>3b. Uniform Claim Identifier (optional):</b> _____ (See instruction #3b)	
<b>4. Secured Claim (See instruction #4)</b> Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information. <b>Nature of property or right of setoff:</b> <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <b>Describe:</b> <b>Value of Property: \$</b> _____ <b>Annual Interest Rate</b> _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable (when case was filed) <b>Amount of arrearage and other charges, as of the time case was filed, included in secured claim,</b> <b>if any: \$</b> _____ <b>Basis for perfection:</b> _____  <b>Amount of Secured Claim: \$</b> _____ <b>Amount Unsecured: \$</b> _____			
<b>6. Claim Pursuant to 11 U.S.C. § 503(b)(9):</b> Indicate the amount of your claim arising from the value of any goods received by the Debtor within 20 days before May 14, 2012, the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____ (See instruction #6)			
<b>7. Credits.</b> The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #7)			
<b>8. Documents:</b> Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #8, and the definition of "redacted") <u>see Attached</u>  DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.  If the documents are not available, please explain:			
<b>9. Signature:</b> (See instruction #9) Check the appropriate box. <input checked="" type="checkbox"/> I am the creditor. <input type="checkbox"/> I am the creditor's authorized agent. <input type="checkbox"/> I am the trustee, or the debtor, or their authorized agent. <input type="checkbox"/> I am a guarantor, surety, indorser, or other codebtor. (Attach copy of power of attorney, if any.) (See Bankruptcy Rule 3004.) (See Bankruptcy Rule 3005.)  I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief. <b>Print Name:</b> <u>Katherine Parker-Lowe</u> <b>Title:</b> <u>Attorney for Gilbert</u> <b>Company:</b> _____ <b>(Signature)</b> <u>Kath. S. Parker-Lowe</u> <b>(Date)</b> <u>10-20-2012</u> <b>Address and telephone number (if different from notice address above):</b> _____ <b>Telephone number:</b> _____ <b>Email:</b> _____			

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

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KURTZMAN CARSON CONSULTANTS

COURT USE ONLY



KATHERINE S. PARKER-LOWE  
 ATTORNEY AT LAW  
 P.O. BOX 730  
 OCRACOE, NC 27960-0730

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CLIENT: Rex Tyler Gilbert, Jr.  
 Post Office Box 504  
 Ocracoke, NC 27960-

Client No. 100725  
 Matter No. 2800056

DATE	CHARGE CODE & SERVICES STATEMENT from 01/01/2008 to 05/13/2012	MINS	AMOUNT CHARGED
08/26/2008	CWC Conference with Client	45	112.50
08/27/2008	TCC Telephone Call T/F Client	10	25.00
09/12/2008	CWC Conference with Client	15	37.50
09/24/2008	CWC Conference with Client	60	150.00
10/02/2008	RAR Received and Reviewed	6	15.00
10/03/2008	EMA Email	10	25.00
10/07/2008	RES Legal Research	120	300.00
10/14/2008	FAX EXPENSE-FAX	2	4.50
10/14/2008	LTC Local Telephone Call	25	62.50
10/14/2008	LTC Local Telephone Call	10	25.00
10/14/2008	TCC Telephone Call T/F Client	6	15.00
10/20/2008	LTC Local Telephone Call	120	300.00
11/02/2008	LTT Draft/Revise Letter	30	75.00
12/01/2008	PAY Payment	1	1,072.00
01/09/2009	LTT Draft/Revise Letter	45	112.50
01/09/2009	LTC Local Telephone Call	6	15.00
01/09/2009	EMA Email	20	50.00
01/10/2009	EMA Email	15	37.50
01/12/2009	FAX EXPENSE-FAX	2	5.20
02/02/2009	LTT Draft/Revise Letter	6	15.00
02/02/2009	POS EXPENSE-Postage	1	.42
02/10/2009	LTT Draft/Revise Letter	30	75.00
02/10/2009	WKO Work On	20	50.00
03/05/2009	EMA Email	6	15.00
03/11/2009	EMA Email	15	37.50
03/24/2009	REF Reviewed File	50	125.00
03/24/2009	LTT Draft/Revise Letter	45	112.50
04/03/2009	CWC Conference with Client	120	300.00
04/03/2009	PAY Payment	1	400.00
04/05/2009	LTT Draft/Revise Letter	240	600.00
04/05/2009	FAX EXPENSE-FAX	12	31.20
04/07/2009	PPL CIVIL-Prepared Pleading	240	600.00
04/08/2009	CWC Conference with Client	15	37.50
04/09/2009	EMA Email	10	25.00
04/09/2009	RES Legal Research	15	37.50
04/09/2009	LDC Long Distance Call	10	27.50
04/09/2009	REF Reviewed File	120	300.00
04/09/2009	LTC Local Telephone Call	10	25.00
04/09/2009	REF Reviewed File	45	112.50
04/30/2009	LTT Draft/Revise Letter	210	525.00
05/01/2009	CWE Conference With Expert	45	135.00



DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
STATEMENT from 01/01/2008 to 05/13/2012			
05/01/2009	LTT Draft/Revise Letter	65	162.50
05/02/2009	POS EXPENSE-Postage	4	1.68
05/02/2009	CCS EXPENSE-Copies/Printing	16	8.00
05/02/2009	FAX EXPENSE-FAX	8	20.80
05/02/2009	LTT Draft/Revise Letter	30	75.00
05/02/2009	PAY Payment	1	350.00
05/11/2009	RAR Received and Reviewed	10	25.00
05/11/2009	FAX EXPENSE-FAX	12	31.20
05/11/2009	TCA Telephone Call T/F Attorney	6	15.00
05/11/2009	TCA Telephone Call T/F Attorney	15	37.50
05/12/2009	RES Legal Research	75	187.50
05/19/2009	PAY Payment	1	600.00
05/25/2009	RES Legal Research	210	525.00
06/01/2009	TRP Trial Preparation	30	75.00
06/02/2009	CWC Conference with Client	25	62.50
06/02/2009	HCL Hearing-Before Clerk	45	112.50
06/02/2009	TRP Trial Preparation	20	50.00
06/12/2009	FAX EXPENSE-FAX	2	5.20
06/15/2009	FAX EXPENSE-FAX	4	10.40
06/16/2009	RAR Received and Reviewed	10	25.00
06/16/2009	RES Legal Research	10	25.00
06/16/2009	EMA Email	6	15.00
06/16/2009	TCL Telephone Call T/F Clerk	10	25.00
06/16/2009	EMA Email	15	37.50
06/18/2009	CCK Conference with Clerk	20	50.00
06/18/2009	FAX EXPENSE-FAX	1	2.60
06/22/2009	PAY Payment	1	600.00
06/23/2009	FAX EXPENSE-FAX	1	2.60
06/23/2009	RAR Received and Reviewed	6	15.00
06/24/2009	TCL Telephone Call T/F Clerk	10	25.00
06/24/2009	LTT Draft/Revise Letter	30	75.00
06/30/2009	EMA Email	15	37.50
06/30/2009	TCT Telephone Call T/F TAdminstrat	6	15.00
07/07/2009	EMA Email	30	75.00
07/16/2009	FAX EXPENSE-FAX	2	5.20
07/16/2009	RAR Received and Reviewed	6	15.00
07/17/2009	RAR Received and Reviewed	10	25.00
07/20/2009	CCS EXPENSE-Copies/Printing	14	7.00
07/20/2009	POS EXPENSE-Postage	3	1.32
07/27/2009	PAY Payment	1	500.00
07/29/2009	TCA Telephone Call T/F Attorney	6	15.00
07/29/2009	RAR Received and Reviewed	15	37.50
07/29/2009	FAX EXPENSE-FAX	2	5.20
07/29/2009	LTT Draft/Revise Letter	60	150.00
07/30/2009	LTT Draft/Revise Letter	30	75.00
07/30/2009	EMA Email	6	15.00
07/30/2009	CWE Conference With Expert	20	60.00
07/30/2009	FAX EXPENSE-FAX	3	7.80
07/30/2009	LTC Local Telephone Call	75	187.50
08/12/2009	CWE Conference With Expert	30	90.00
08/12/2009	PBR Prepared Brief	75	187.50
08/13/2009	CWE Conference With Expert	20	60.00
08/15/2009	PBR Prepared Brief	45	112.50
08/18/2009	TRA Travel	180	225.00
08/18/2009	CCS EXPENSE-Copies/Printing	69	34.50
08/18/2009	HSC Hearing-Superior Court	90	270.00
08/18/2009	CWC Conference with Client	15	37.50
08/18/2009	TRA Travel	180	225.00



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
 STATEMENT from 01/01/2008 to 05/13/2012

DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
08/20/2009	PAY Payment	1	500.00
09/09/2009	CWC Conference with Client	100	250.00
09/10/2009	PPL CIVIL-Prepared Pleading	45	112.50
09/10/2009	PPL CIVIL-Prepared Pleading	120	300.00
09/10/2009	PPL CIVIL-Prepared Pleading	120	300.00
09/12/2009	PPL CIVIL-Prepared Pleading	150	375.00
09/12/2009	PPL CIVIL-Prepared Pleading	120	300.00
09/13/2009	TRP Trial Preparation	300	750.00
09/13/2009	PPL CIVIL-Prepared Pleading	90	225.00
09/14/2009	HSC Hearing-Superior Court	30	90.00
09/14/2009	FPL CIVIL- Filed Pleadings	30	75.00
09/14/2009	FPL CIVIL- Filed Pleadings	15	37.50
09/14/2009	TRA Travel	90	112.50
09/14/2009	TRA Travel	90	112.50
09/15/2009	SDC Serve Pleading, Motion, etc	150	375.00
09/18/2009	TCL Telephone Call T/F Clerk	10	25.00
09/18/2009	TCA Telephone Call T/F Attorney	10	25.00
09/18/2009	POS EXPENSE-Postage	6	2.64
09/18/2009	TCL Telephone Call T/F Clerk	10	25.00
09/18/2009	PDC Prepared Document(s)	15	37.50
09/18/2009	FAX EXPENSE-FAX	20	52.00
09/18/2009	TCA Telephone Call T/F Attorney	6	15.00
09/18/2009	TCA Telephone Call T/F Attorney	6	15.00
09/19/2009	CWC Conference with Client	10	25.00
09/19/2009	CWE Conference With Expert	15	45.00
09/24/2009	HSC Hearing-Superior Court	15	45.00
09/24/2009	TRA Travel	90	112.50
09/24/2009	TRA Travel	300	375.00
09/25/2009	FAX EXPENSE-FAX	6	15.60
09/25/2009	PDC Prepared Document(s)	120	300.00
09/25/2009	ADV Advance-Expense	1	180.00
09/30/2009	TRA Travel	240	300.00
10/01/2009	CWC Conference with Client	30	75.00
10/01/2009	HSC Hearing-Superior Court	165	495.00
10/01/2009	TRA Travel	240	300.00
10/02/2009	ADV Advance-Expense	2	20.00
10/02/2009	CCS EXPENSE-Copies/Printing	190	95.00
10/02/2009	POS EXPENSE-Postage	3	27.56
10/02/2009	PIB Post Injunction Bond	15	37.50
10/02/2009	WKO Work On	135	337.50
10/02/2009	PPO Prepared Order(s)	60	150.00
10/07/2009	FAX EXPENSE-FAX	4	10.40
10/07/2009	RAR Received and Reviewed	15	37.50
10/07/2009	PPO Prepared Order(s)	30	75.00
10/17/2009	RES Legal Research	30	75.00
10/19/2009	PAY Payment	1	500.00
10/19/2009	PDC Prepared Document(s)	75	187.50
10/19/2009	POS EXPENSE-Postage	1	4.95
10/26/2009	EFI Efile documents with court	20	50.00
10/26/2009	PDC Prepared Document(s)	15	37.50
10/27/2009	TCL Telephone Call T/F Clerk	6	15.00
10/27/2009	EFI Efile documents with court	10	25.00
10/29/2009	CCS EXPENSE-Copies/Printing	54	27.00
10/29/2009	POS EXPENSE-Postage	2	19.86
10/29/2009	CCS EXPENSE-Copies/Printing	8	4.00
10/30/2009	RES Legal Research	60	150.00
10/30/2009	PPM Prepared Motion	130	325.00
10/31/2009	PBR Prepared Brief	180	450.00



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
 STATEMENT from 01/01/2008 to 05/13/2012

DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
11/01/2009	PBR Prepared Brief	120	300.00
11/02/2009	TCA Telephone Call T/F Attorney	10	25.00
11/02/2009	PPM Prepared Motion	75	187.50
11/02/2009	EFI Efile documents with court	20	50.00
11/03/2009	LTT Draft/Revise Letter	15	37.50
11/03/2009	LDC Long Distance Call	10	27.50
11/03/2009	EFI Efile documents with court	10	25.00
11/03/2009	PPO Prepared Order(s)	15	37.50
11/04/2009	TCA Telephone Call T/F Attorney	10	25.00
11/16/2009	PBR Prepared Brief	240	600.00
11/17/2009	PBR Prepared Brief	55	137.50
12/15/2009	EMA Email	10	25.00
12/16/2009	TCJ Telephone Call T/F Judge	6	18.00
12/16/2009	LTC Local Telephone Call	6	15.00
12/16/2009	PPO Prepared Order(s)	15	37.50
12/16/2009	EMA Email	6	15.00
12/23/2009	FAX EXPENSE-FAX	1	2.60
12/23/2009	TCL Telephone Call T/F Clerk	6	15.00
12/23/2009	LTT Draft/Revise Letter	20	50.00
01/12/2010	PBR Prepared Brief	240	600.00
01/13/2010	PPB Prepared Brief/Memorandum	90	225.00
01/15/2010	ROA APPEAL- Prepare Record	180	540.00
01/16/2010	ROA APPEAL- Prepare Record	210	630.00
01/18/2010	ROA APPEAL- Prepare Record	270	810.00
01/18/2010	RAR Received and Reviewed	10	25.00
01/18/2010	FAX EXPENSE-FAX	2	5.20
01/22/2010	PAY Payment	1	500.00
02/24/2010	ROA APPEAL- Prepare Record	60	180.00
02/26/2010	PPM Prepared Motion	45	112.50
02/26/2010	LTT Draft/Revise Letter	150	375.00
02/27/2010	PPM Prepared Motion	90	225.00
02/27/2010	POS EXPENSE-Postage	2	2.78
03/01/2010	PBR Prepared Brief	180	450.00
03/09/2010	RAR Received and Reviewed	10	25.00
03/09/2010	RAR Received and Reviewed	10	25.00
03/09/2010	RES Legal Research	20	50.00
03/09/2010	RES Legal Research	20	50.00
03/10/2010	ROA APPEAL- Prepare Record	135	405.00
03/10/2010	ROA APPEAL- Prepare Record	75	225.00
03/25/2010	CCS EXPENSE-Copies/Printing	502	251.00
04/16/2010	PPB Prepared Brief/Memorandum	40	100.00
04/20/2010	PPB Prepared Brief/Memorandum	150	450.00
04/21/2010	PBR Prepared Brief	45	112.50
04/21/2010	ADV Advance-Expense	1	332.50
04/22/2010	PBR Prepared Brief	180	450.00
04/29/2010	PBR Prepared Brief	135	337.50
04/30/2010	PBR Prepared Brief	135	337.50
04/30/2010	PBR Prepared Brief	180	450.00
05/01/2010	PBR Prepared Brief	135	337.50
05/01/2010	PBR Prepared Brief	210	525.00
05/02/2010	PBR Prepared Brief	90	225.00
05/03/2010	PBR Prepared Brief	135	337.50
05/03/2010	PBR Prepared Brief	300	750.00
05/03/2010	PAY Payment	1	332.50
05/06/2010	PBR Prepared Brief	180	450.00
05/06/2010	PBR Prepared Brief	210	525.00
05/11/2010	PAY Payment	1	500.00
05/18/2010	ADV Advance-Expense	1	218.50



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
 STATEMENT from 01/01/2008 to 05/13/2012

DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
06/10/2010	DDP CIVIL-Draft Discovery Plan	75	150.00
06/10/2010	DDP CIVIL-Draft Discovery Plan	120	360.00
06/11/2010	DDP CIVIL-Draft Discovery Plan	120	360.00
06/11/2010	PAY Payment	1	500.00
06/11/2010	CWE Conference With Expert	65	195.00
06/12/2010	DDP CIVIL-Draft Discovery Plan	40	120.00
06/14/2010	TCA Telephone Call T/F Attorney	10	25.00
06/14/2010	RES Legal Research	30	75.00
06/14/2010	DDP CIVIL-Draft Discovery Plan	75	225.00
06/16/2010	PPB Prepared Brief/Memorandum	120	300.00
06/16/2010	PPB Prepared Brief/Memorandum	90	225.00
06/17/2010	PPB Prepared Brief/Memorandum	120	300.00
06/19/2010	PPB Prepared Brief/Memorandum	240	600.00
06/21/2010	PPB Prepared Brief/Memorandum	180	450.00
06/21/2010	POS EXPENSE-Postage	2	3.46
06/21/2010	PPB Prepared Brief/Memorandum	45	112.50
06/24/2010	TCA Telephone Call T/F Attorney	6	15.00
06/28/2010	EMA Email	10	25.00
06/28/2010	EMA Email	6	15.00
06/28/2010	PDC Prepared Document(s)	30	75.00
06/29/2010	TCA Telephone Call T/F Attorney	10	25.00
06/29/2010	EMA Email	10	25.00
06/29/2010	LTT Draft/Revise Letter	45	112.50
06/29/2010	EMA Email	6	15.00
07/01/2010	TCA Telephone Call T/F Attorney	30	75.00
07/07/2010	ADV Advance-Expense	1	50.75
07/09/2010	RES Legal Research	120	300.00
07/13/2010	PPM Prepared Motion	210	525.00
07/13/2010	CWC Conference with Client	90	225.00
07/14/2010	PPM Prepared Motion	75	187.50
07/14/2010	CCK Conference with Clerk	10	25.00
07/19/2010	PAY Payment	1	500.00
07/20/2010	PPB Prepared Brief/Memorandum	120	300.00
07/20/2010	PPB Prepared Brief/Memorandum	120	300.00
07/27/2010	PPB Prepared Brief/Memorandum	240	600.00
07/28/2010	PPB Prepared Brief/Memorandum	210	525.00
07/29/2010	PPB Prepared Brief/Memorandum	240	600.00
07/30/2010	PPB Prepared Brief/Memorandum	120	300.00
07/31/2010	PPB Prepared Brief/Memorandum	210	525.00
08/02/2010	PPB Prepared Brief/Memorandum	240	600.00
08/02/2010	TRP Trial Preparation	20	50.00
08/02/2010	FAX EXPENSE-FAX	21	54.60
10/06/2010	PPM Prepared Motion	180	540.00
10/07/2010	ADV Advance-Expense	1	21.85
10/07/2010	TCA Telephone Call T/F Attorney	15	37.50
10/07/2010	EMA Email	15	37.50
10/07/2010	EMA Email	45	112.50
10/07/2010	LTC Local Telephone Call	30	75.00
10/07/2010	CCS EXPENSE-Copies/Printing	70	35.00
10/07/2010	RES Legal Research	10	25.00
10/08/2010	RES Legal Research	20	50.00
10/08/2010	LDC Long Distance Call	30	82.50
10/09/2010	PPM Prepared Motion	240	600.00
10/10/2010	EMA Email	6	15.00
10/10/2010	PPM Prepared Motion	210	525.00
10/11/2010	PPM Prepared Motion	300	750.00
10/12/2010	PPM Prepared Motion	210	525.00
10/12/2010	RAR Received and Reviewed	20	50.00



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
 STATEMENT from 01/01/2008 to 05/13/2012

DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
10/18/2010	PAY Payment	1	500.00
10/20/2010	RES Legal Research	240	600.00
10/29/2010	LTT Draft/Revise Letter	20	50.00
10/29/2010	CCS EXPENSE-Copies/Printing	22	11.00
11/01/2010	RAR Received and Reviewed	6	15.00
11/05/2010	WKO Work On	75	187.50
11/05/2010	PPN Prepared Notice of Appeal	30	75.00
11/08/2010	RES Legal Research	75	187.50
11/15/2010	PAI APPEAL-Prepare Appeal Issues	105	262.50
11/16/2010	PAI APPEAL-Prepare Appeal Issues	180	540.00
11/19/2010	RES Legal Research	20	50.00
11/19/2010	PPM Prepared Motion	75	187.50
11/19/2010	PDC Prepared Document(s)	15	37.50
11/19/2010	EFI Efile documents with court	10	25.00
11/20/2010	PPM Prepared Motion	150	375.00
11/21/2010	PPM Prepared Motion	150	375.00
11/21/2010	CFW Conference	45	112.50
11/29/2010	PPB Prepared Brief/Memorandum	240	600.00
11/30/2010	PPB Prepared Brief/Memorandum	240	600.00
12/02/2010	PDC Prepared Document(s)	75	187.50
12/02/2010	TCA Telephone Call T/F Attorney	10	25.00
12/02/2010	EFI Efile documents with court	20	50.00
12/03/2010	EFI Efile documents with court	10	25.00
12/03/2010	PPM Prepared Motion	195	487.50
12/03/2010	POS EXPENSE-Postage	2	1.22
12/04/2010	PPM Prepared Motion	75	187.50
12/15/2010	RAR Received and Reviewed	6	15.00
12/15/2010	RAR Received and Reviewed	6	15.00
12/16/2010	TCC Telephone Call T/F Client	15	37.50
01/04/2011	MDT CIVIL-Mediation	150	450.00
01/07/2011	DOA APPEAL-Draft Oral Argument	225	938.25
01/21/2011	RES Legal Research	90	225.00
01/21/2011	TCC Telephone Call T/F Client	15	37.50
01/21/2011	LDC Long Distance Call	10	27.50
01/22/2011	RES Legal Research	120	300.00
01/24/2011	TCC Telephone Call T/F Client	10	25.00
01/24/2011	PBR Prepared Brief	300	750.00
01/24/2011	TCC Telephone Call T/F Client	6	15.00
01/26/2011	RES Legal Research	45	112.50
01/29/2011	PBR Prepared Brief	90	225.00
01/31/2011	PBR Prepared Brief	75	187.50
02/01/2011	EFI Efile documents with court	10	25.00
02/01/2011	POS EXPENSE-Postage	3	1.32
02/01/2011	EMA Email	6	15.00
02/01/2011	WKO Work On	45	112.50
02/01/2011	CCS EXPENSE-Copies/Printing	10	5.00
02/01/2011	CCS EXPENSE-Copies/Printing	102	51.00
02/02/2011	POS EXPENSE-Postage	1	4.95
02/08/2011	PBR Prepared Brief	75	187.50
02/09/2011	PBR Prepared Brief	75	187.50
02/10/2011	PBR Prepared Brief	420	1,050.00
02/14/2011	PDC Prepared Document(s)	75	187.50
02/19/2011	PBR Prepared Brief	75	187.50
02/19/2011	PBR Prepared Brief	90	225.00
02/22/2011	PBR Prepared Brief	90	225.00
02/22/2011	PBR Prepared Brief	120	300.00
02/22/2011	PBR Prepared Brief	300	750.00
02/25/2011	PBR Prepared Brief	420	1,050.00



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
STATEMENT from 01/01/2008 to 05/13/2012

DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
02/26/2011	PBR Prepared Brief	90	225.00
02/28/2011	PBR Prepared Brief	270	675.00
03/29/2011	PAY Payment	1	500.00
04/20/2011	PAY Payment	1	500.00
04/21/2011	TCL Telephone Call T/F Clerk	10	25.00
04/23/2011	PPM Prepared Motion	75	187.50
04/23/2011	PPB Prepared Brief/Memorandum	90	225.00
04/25/2011	PPB Prepared Brief/Memorandum	240	600.00
04/26/2011	PPB Prepared Brief/Memorandum	240	600.00
05/03/2011	RAR Received and Reviewed	45	112.50
05/03/2011	PPB Prepared Brief/Memorandum	90	225.00
05/03/2011	EMA Email	20	50.00
05/03/2011	CWC Conference with Client	20	50.00
05/06/2011	PPB Prepared Brief/Memorandum	75	187.50
05/09/2011	PPB Prepared Brief/Memorandum	270	675.00
05/09/2011	RES Legal Research	60	150.00
05/12/2011	PPB Prepared Brief/Memorandum	240	600.00
05/13/2011	PPB Prepared Brief/Memorandum	120	300.00
05/13/2011	RES Legal Research	75	187.50
05/13/2011	CFW Conference	40	100.00
05/14/2011	PPB Prepared Brief/Memorandum	120	300.00
05/14/2011	CWE Conference With Expert	75	225.00
05/15/2011	CWE Conference With Expert	135	405.00
05/15/2011	PPB Prepared Brief/Memorandum	120	300.00
05/15/2011	PPB Prepared Brief/Memorandum	210	525.00
05/16/2011	CWE Conference With Expert	60	180.00
05/16/2011	PPB Prepared Brief/Memorandum	75	187.50
05/26/2011	PAY Payment	1	400.00
06/07/2011	PAY Payment	1	100.00
06/15/2011	RAR Received and Reviewed	30	75.00
06/16/2011	PDC Prepared Document(s)	45	112.50
06/16/2011	EFI Efile documents with court	20	50.00
06/17/2011	TCT Telephone Call T/F TAdminstrat	10	25.00
06/20/2011	TCC Telephone Call T/F Client	15	37.50
06/21/2011	TCA Telephone Call T/F Attorney	30	75.00
06/21/2011	TCL Telephone Call T/F Clerk	6	15.00
06/22/2011	TCL Telephone Call T/F Clerk	10	25.00
07/03/2011	PPM Prepared Motion	45	112.50
07/04/2011	RES Legal Research	90	225.00
07/04/2011	PPM Prepared Motion	60	150.00
07/05/2011	PAY Payment	1	500.00
07/14/2011	RES Legal Research	40	100.00
07/15/2011	CWC Conference with Client	45	112.50
07/15/2011	LTT Draft/Revise Letter	180	450.00
07/27/2011	TCL Telephone Call T/F Clerk	15	37.50
08/09/2011	PAY Payment	1	500.00
08/12/2011	CWC Conference with Client	45	112.50
08/16/2011	PAY Payment	1	10,000.00
08/23/2011	LTT Draft/Revise Letter	75	187.50
09/03/2011	RES Legal Research	240	600.00
09/13/2011	TCC Telephone Call T/F Client	10	25.00
09/13/2011	LTC Local Telephone Call	10	25.00
09/13/2011	CWC Conference with Client	15	37.50
09/13/2011	CFW Conference	15	37.50
09/29/2011	RAR Received and Reviewed	30	75.00
09/29/2011	RES Legal Research	30	75.00
10/17/2011	PAY Payment	1	500.00
10/17/2011	EMA Email	30	75.00



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
 STATEMENT from 01/01/2008 to 05/13/2012

DATE	CHARGE CODE & SERVICES	MINS	AMOUNT CHARGED
10/17/2011	EMA Email	6	15.00
10/18/2011	RES Legal Research	45	112.50
12/06/2011	MIL EXPENSE-Mileage	267	146.85
12/06/2011	TRA Travel	360	450.00
12/07/2011	AAP Appearance in Court	270	810.00
12/08/2011	AAP Appearance in Court	180	540.00
12/08/2011	TRA Travel	360	450.00
12/08/2011	MIL EXPENSE-Mileage	260	143.00
12/12/2011	RAR Received and Reviewed	6	15.00
12/13/2011	CCK Conference with Clerk	10	25.00
12/26/2011	DOA APPEAL-Draft Oral Argument	420	1,751.40
12/27/2011	DOA APPEAL-Draft Oral Argument	180	750.60
01/01/2012	DOA APPEAL-Draft Oral Argument	90	375.30
01/02/2012	DOA APPEAL-Draft Oral Argument	210	875.70
01/03/2012	DOA APPEAL-Draft Oral Argument	75	312.75
01/04/2012	DOA APPEAL-Draft Oral Argument	120	500.40
01/05/2012	DOA APPEAL-Draft Oral Argument	120	500.40
01/06/2012	DOA APPEAL-Draft Oral Argument	285	1,188.45
01/09/2012	DOA APPEAL-Draft Oral Argument	240	1,000.80
01/12/2012	DOA APPEAL-Draft Oral Argument	90	375.30
01/12/2012	DOA APPEAL-Draft Oral Argument	75	312.75
01/13/2012	DOA APPEAL-Draft Oral Argument	120	500.40
01/13/2012	DOA APPEAL-Draft Oral Argument	30	125.10
01/13/2012	DOA APPEAL-Draft Oral Argument	210	875.70
01/20/2012	DOA APPEAL-Draft Oral Argument	180	750.60
01/23/2012	MIL EXPENSE-Mileage	267	146.85
01/23/2012	TRA Travel	480	600.00
01/24/2012	ARG APPEAL-ORAL ARGUMENT	135	788.40
01/24/2012	TRA Travel	390	487.50
01/24/2012	MIL EXPENSE-Mileage	260	143.00
01/30/2012	APA APPEAL-Supp Authorities	180	540.00
02/06/2012	APA APPEAL-Supp Authorities	150	450.00
02/06/2012	APA APPEAL-Supp Authorities	120	360.00
02/23/2012	CWC Conference with Client	60	150.00
03/09/2012	PAY Payment	1	1,000.00
03/19/2012	PAY Payment	1	500.00
03/27/2012	RAR Received and Reviewed	20	50.00
03/28/2012	RES Legal Research	6	15.00
03/28/2012	TCL Telephone Call T/F Clerk	15	37.50
03/28/2012	RES Legal Research	30	75.00
03/28/2012	TAP Telephone T/F Adverse Party	15	41.25
03/29/2012	TAP Telephone T/F Adverse Party	10	25.00
03/30/2012	EMA Email	30	75.00
03/30/2012	EFI Efile documents with court	20	50.00
04/01/2012	PAY Payment	1	179.99
04/03/2012	CFW Conference	30	75.00
04/03/2012	LDC Long Distance Call	30	82.50
04/03/2012	TCL Telephone Call T/F Clerk	6	15.00
04/11/2012	TCC Telephone Call T/F Client	6	15.00
04/11/2012	TCC Telephone Call T/F Client	6	15.00
04/11/2012	LTC Local Telephone Call	6	15.00
04/11/2012	TAP Telephone T/F Adverse Party	10	32.00
04/11/2012	PAY Payment	1	1,000.00
04/11/2012	RAR Received and Reviewed	6	15.00
04/13/2012	FAX EXPENSE-FAX	4	10.40
04/13/2012	RAR Received and Reviewed	20	50.00
04/14/2012	PPM Prepared Motion	120	300.00
04/16/2012	CFW Conference	15	37.50



DATE CHARGE CODE & SERVICES MINS AMOUNT CHARGED  
 STATEMENT from 01/01/2008 to 05/13/2012

04/16/2012	PPM Prepared Motion	65	162.50
04/16/2012	RES Legal Research	20	50.00
04/16/2012	POS EXPENSE-Postage	3	3.15
04/16/2012	CCS EXPENSE-Copies/Printing	54	27.00
04/17/2012	NOH CIVIL-NOTICE OF HEARING	15	37.50
04/17/2012	POS EXPENSE-Postage	5	2.25
04/17/2012	CCS EXPENSE-Copies/Printing	17	8.50
04/17/2012	CCK Conference with Clerk	10	25.00
04/19/2012	TCA Telephone Call T/F Attorney	6	15.00
04/23/2012	PAY Payment	1	500.00
04/24/2012	TCA Telephone Call T/F Attorney	6	15.00
04/24/2012	TCA Telephone Call T/F Attorney	15	37.50
04/24/2012	TCA Telephone Call T/F Attorney	6	15.00
04/25/2012	RAR Received and Reviewed	6	15.00
04/28/2012	RAR Received and Reviewed	10	25.00
04/30/2012	RAR Received and Reviewed	20	50.00
05/03/2012	RAR Received and Reviewed	30	75.00
05/03/2012	EMA Email	30	75.00
05/09/2012	TCT Telephone Call T/F TAdminstrat	10	25.00

Total Charges	\$83,181.11
Total Payments	\$23,534.49
Balance Due	\$59,646.62

TIME BREAKDOWN 33519 Minutes  
 Or more than 559 Hours

**BALANCE TO BE REMITTED IMMEDIATELY**